Supreme Court, U.S.
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No. 01 1193

IN THE

Supreme Court of the United States

CARL YOUNGBLOOD,

Petitioner,

v.

HY-VEE FOOD STORES, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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85 pp

QUESTION PRESENTED

Whether 42 U.S.C. §1981 proscribes discrimination in all phases of contractual relationships, including after entry into retail contracts, as it does after entry into employment contracts?

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OPINION BELOW

The September 17, 2001 decision of the United States Court of Appeals for the Eighth Circuit is reported at 266 F.3d 851 (R. Arnold, J., dissenting), and is included in the petition appendix.

JURISDICTION

This Court's jurisdiction to review the ruling of the United States Court of Appeals for the Eighth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Eighth Circuit issued its decision in this case on September 17, 2001. Youngblood filed a timely petition for rehearing and rehearing *en banc* which that court denied on November 12, 2001 (Riley, J., and M.S. Arnold, J. would grant the petition)[A-59]. The order is included in the petition appendix. This petition has been filed within ninety days of the date rehearing was denied, as required by Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. Amend. XIV.

The Civil Rights Act of 1866 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...

42 U.S.C. §1981.

The Civil Rights Act of 1991 amended §1981 to provide:

> "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. §1981(b).

For sales contracts, the Missouri version of the Uniform Commercial Code provides that:

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(a) a "sale on approval" if the goods are delivered primarily for use

400.2-326 RSMo.

Implied warranty--merchantability

(1) Unless excluded or modified (section 400.2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations

of fact made on the container or label if any.

(3) Unless excluded or modified (section 400.2-316) other implied warranties may arise from course of dealing or usage of trade.

400.2-314 RSMo.

Buyer's rights on improper delivery

Subject to the provisions of this article ... and unless otherwise agreed under the sections on contractual limitations of remedy (sections 400.2-718 and 400.2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or

(b) accept the whole;

400.2-601 RSMo.

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (sections 400.2-603 and 400.2-604),

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions

of this article (subsection (3) of section 400.2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this article on seller's remedies in general (section 400.2-703).

400.2-602 RSMo.

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of section 400.2- 602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

400.2-606 RSMo.

STATEMENT

1. *Nature of the Suit.* This case is a claim against Hy-Vee Food Stores, Inc. ("Hy-Vee") for intentional denial of the civil rights of Carl Youngblood ("Youngblood"); namely, his right to the enjoyment of all benefits, privileges, terms, and conditions of a contractual relationship in the retail setting, as protected under 42 U.S.C. §1981. Youngblood selected and paid for a grocery item in Hy-Vee's store. Immediately after receiving his receipt and the merchandise from the cashier, Youngblood was surrounded by three Hy-Vee employees. Youngblood was prevented from receiving the benefit of his purchase (the grocery item), because of his race, and Hy-Vee prevented him from leaving the store. Youngblood attempted to enforce the sales contract when he asked that the merchandise or the purchase price be returned to him. Hy-Vee refused, and its manager responded, "You and your people have to pay double." Other Hy-Vee employees testified that Hy-Vee engaged in a pattern and practice of racial discrimination in order to target African-Americans to keep them out of its store.

2. *The District Court.* On Hy-Vee's motion for summary judgment, the District Court finds sufficient evidence that Hy-Vee took the merchandise from Youngblood because of his race, and sufficient evidence that Hy-Vee acted with intent to discriminate. The District Court, however, holds that racial discrimination in the contractual relationship is not actionable under §1981 if the discrimination occurs after contract formation.

3. *The Eighth Circuit.* On appeal of the District Court's entry of summary judgment, the Circuit Court panel holds (2-1) that no contractual relationship remained once Youngblood

received his merchandise.[1] The panel, therefore, concludes that no rights protected under §1981 were violated, and affirms summary judgment. The dissent, however, notes that "racial discrimination pervaded the entire contracting process," and in addressing the rights protected by §1981 states, "[a] person's right to leave a store where he has purchased an item without being surrounded, detained, and having the item removed from his possession (and his money not returned) can easily be understood as a 'benefit' of the contract." The dissent further articulates: "Given § 1981's remedial purpose, whether Youngblood had been detained and the [merchandise] seized prior to his paying for it, as he was paying for it, or as he was heading for the exit with it should not make a difference under § 1981." *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 859 (8th Cir. 2001)[A-13].

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit Decision Employs Obsolete Law To Reach Its Decision

This Court holds that 42 U.S.C. §1981 relates to all contracts. *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 304, 114 S.Ct. 1510, 1515 (1994). *Rivers* remains good law. In 1989 this Court interpreted the language of §1981 as protecting against racial discrimination in contract relationships only until entry into a contract, but not after contract formation. *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-7, 109 S.Ct. 2363, 2372-3 (1989). In direct response to the *Patterson* court opinion, Congress enacted the Civil Rights Act of 1991. The Act was intended to overrule *Patterson* and expand the rights protected by §1981 to expressly proscribe discrimination

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[1]Neither the district court nor the circuit court panel cites authority for the conclusion that a retail contractual relationship terminates at the point of sale.

occurring after a contract is formed, by adding defining language to the statute. H.R. Rep. No. 40-(II), 102 Cong. 1st Sess. 1991, 1991 WL 87020; *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 114 S.Ct. 1510 (1994).

The Circuit Court opinion below holds that §1981 does not protect against discriminatory conduct once a retail contract is formed. *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 854 (8th Cir. 2001)[A-2, A-4]. There is little difference, if any, between the Eighth Circuit's interpretation of Section 1981 in this case, and the *Patterson* court's interpretation from 1989. Congress, however, has clarified the scope of §1981 since *Patterson* was decided. Congress amended §1981 to prevent discrimination after contract formation. *See generally*, *Rivers*. The Civil Rights Act of 1991 defines the right to "make and enforce contracts" as including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. §1981(b); H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 92 (1991), reprinted in 1991 U.S.Code Cong. & Admin. News 549, 630; H.R.Rep. No. 102-40(II), at 37 (1991), U.S. Code Cong. & Admin. News at 549, 731.[2] Congress made the intent of §1981 abundantly clear when it legislatively overturned *Patterson*.[3] *Id.* Section 1981 is not to be interpreted narrowly as the Eighth Circuit panel opinion has done in this case. H.R.Rep. No. 102-40(II), at 2 (1991), U.S.Code Cong. & Admin.News 1991, 549, 695 ("By restoring the broad scope of Section 1981, Congress will

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[2]"This section amends 42 U.S.C. S 1981 (commonly referred to as "Section 1981") to overturn *Patterson v. McLean Credit Union* and to codify *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586 (1976)."

[3]and codified *Runyon v. McCrary*, 427 U.S. 160, 96 S.Ct. 2586 (1976); H.R. REP. 102-40 (II), 35.

ensure that all Americans may not be harassed, fired or otherwise discriminated against in contracts because of their race."). Section 1981 provides a cause of action for racial discrimination occurring after a contract is formed, and Congress should not be required to reaffirm its intent in a new Civil Rights Act specifically for retail sales (or other) contracts.

In general, retail sales contracts do not conclude at formation. Indeed, the substantive law of Missouri (the jurisdiction in which the relevant contract was formed) demonstrates that the contractual relationship between buyer and seller extends well beyond formation and delivery. Buyers may return merchandise purchased in a retail setting. 400.2-326 RSMo. Sellers must honor the implied warranty of merchantability for goods they sell. 400.2-314 RSMo. And, buyers may reject goods after a reasonable time to inspect them for non-conformance. 400.2-601; 400.2-602 RSMo. Therefore, the relationship between Youngblood and Hy-Vee in this case did not end before Youngblood had a reasonable opportunity to inspect the merchandise, or before he left the store and had a reasonable opportunity to enjoy the benefit his contract. The contractual relationship simply did not end at the point Youngblood paid for the goods, as the Circuit Court opinion urges.

When Hy-Vee surrounded Youngblood and took purchased goods back from him before he left the store, Hy-Vee denied Youngblood his rights to the "making, performance, modification, and termination of contracts, and to the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[4] When Hy-Vee denied these

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[4]The Eighth Circuit also does not address the fact that Youngblood attempted to enforce his contract when he requested that his merchandise or his money be returned to him.

rights because Youngblood is black,[5] Hy-Vee violated 42 U.S.C. §1981.

II. The Eighth Circuit's Decision Conflicts With The Decisions Of Other Circuits

The Eighth Circuit's holding in this case, and the Fifth Circuit's holding in a recent opinion (citing this case as precedent),[6] create a split among the Circuits as to what conduct in the retail setting is covered by §1981.[7] The Eighth

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[5]As noted by the dissent:
"There is evidence of racial discrimination in this case. The District Court determined that Youngblood had produced enough evidence to show Hy-Vee's discriminatory intent, *Youngblood v. Hy-Vee Food Stores, Inc.*, No. 99-0629-CV-W-2-ECF, slip op. at 24 (W.D. Mo. Dec. 15, 2000), and statements in the record confirm this determination. Regarding Hy-Vee's practices, there is evidence from several former store employees that Hy-Vee had a discriminatory pattern and practice of targeting, surveilling, stopping, and prosecuting black customers disproportionately to white customers. See Appellant's Appendix at 704, 709-10, 713-14.
Regarding the incident itself, Youngblood states that while he was being detained upstairs in the store, he was prevented from making a telephone call, and Hy-Vee employees were laughing and smirking. *Id.* at 429, 430. When he suggested that there was nothing funny about the situation, a Hy-Vee manager said: "I see a whole lot funny about it." *Id.* at 429. When Youngblood asked for his money back, he was told by the manager: "You and your people have to pay back double the amount." *Id.* at 430."
Youngblood v. Hy-Vee Food Stores, Inc., 266 F.3d 851, 853 (8th Cir. 2001).

[6]*Morris v. Dillard Dept. Stores, Inc.*, 2001 WL 1650937*5 (5th Cir. La., 2001)

[7]The Eighth Circuit panel relies on opinions from District Courts in the Third and Eleventh Circuits. *Lewis v. J.C. Penney Co. Inc.*, 948 F.Supp. 367, 372 (D.Del.1996); *Rogers v. Elliott*, 135 F.Supp.2d 1312, 1315 (N.D.Ga.2001). The opinions, however, do not support the Eighth Circuit's conclusion. In the cases cited by the Eighth Circuit, none of the

Circuit panel points to "scant precedent" for determining "whether any contractual relationship remained once Youngblood completed his purchase and if the taking of [his merchandise] denied Youngblood a benefit of the contractual relationship." *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 854 (8th Cir. Mo. 2001)[A-4]. The Eighth Circuit then concludes that "[N]othing that happened after the sale created any further contractual duty on Hy-Vee's part. Accordingly, Hy-Vee cannot be said to have deprived Youngblood of the benefit of any contractual relationship, as no such relationship existed when it took the [merchandise] away from Youngblood." *Id.* The Fifth Circuit cites to this case for the proposition that "the merchant cannot be said to have deprived [the plaintiff] of any benefit of any contractual relationship, as no such relationship existed at the time of the arrest because nothing that happened after the sale created any further contractual duty on [the merchant's] part." *Morris v. Dillard Dept. Stores, Inc.*, 2001 WL 1650937*5 (5th Cir. La., 2001) (quoting, *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. Mo. 2001).

The First, Sixth, Seventh, Tenth, and Eleventh Circuits, however, take positions contrary to the Eighth and Fifth Circuits. These Circuits correctly hold that the contractual relationship extends to conduct occurring during contract formation and after a retail contract is formed. 42 U.S.C. 1981(b).

The First Circuit holds, in *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341 (1st Cir. 1995), that a black patron removed from a restaurant after making purchase and receiving food, would have stated a cause

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plaintiffs had the benefit of their contract taken from them as it was in this case.

of action under §1981 for violation of her right to make and enforce contracts if she had offered evidence of racial animus as the motivation for her removal after the sale. In the case at bar, the lower court found sufficient evidence of Hy-Vee's racial animus as the motivating factor in denying Youngblood the benefit of his purchase. 266 F.3d at 858.

The Sixth Circuit also holds that §1981 protections reach conduct occurring after contract formation, in addition to the right to enter into contracts. *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001). The Sixth Circuit adopts a three-part test for determining rights protected by §1981 in the commercial or retail context. Under the Sixth Circuit test, the plaintiff must show he was:

> "denied the right to enter into or enjoy the benefits or privileges of the contractual relationship in that (a) plaintiff was deprived of services while similarly situated persons outside the protected class were not and/or (b) plaintiff received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory."

Id, at 872.

In *Daniels v. Pipefitters' Association Local Union No. 597*, 945 F.2d 906 (7th Cir.1991), cert. denied, 503 U.S. 951, 112 S.Ct. 1514 (1992), the Seventh Circuit holds that after entering into a contract for membership in a union, the contracting party states a §1981 cause of action against the union for denying his right to benefits which can only be realized after entering into the contract. After the membership contract was formed, the union discriminated based on the contracting party's race, by conferring work (the primary benefit of the contract) differently for blacks and whites. The Seventh Circuit correctly holds,

even under the old *Patterson* standard, that §1981 protections do not end when a minority is allowed to enter into a contract, but that protections extend to post-contract formation conduct. *Id.*

Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091 (10th Cir. 2001), was recently decided by the Tenth Circuit, and holds that contractual relationships and §1981 protections do not conclude at formation of a retail sales contract, and what constitutes benefit of a contract under §1981 is a question of fact. The plaintiff in *Hampton* was allowed to enter into a contract (make her purchase). As a benefit of her purchase, she received a coupon for free cologne along with the retail item she selected. When the store took the cologne coupon and did not return it[8] (after contract formation and before she left the store), the Tenth Circuit correctly upholds the jury's determination that the store interfered with the plaintiff's enjoyment of a benefit of her purchase. Because the jury determined that the store's interference was motivated by racial discrimination, the court rightfully holds that the store's post-contract formation conduct violates §1981.

The Eleventh Circuit also comes down on the side that §1981 covers post-contract formation conduct in the retail sales context. In *Moore v. Liberty Nat. Life Ins. Co.*, 267 F.3d 1209 (11th Cir. 2001), the court, through dicta, supports a §1981 claim for denial of benefits conferred by contract, after a sales transaction in which an insurance policy was purchased.

The Eighth Circuit (by its opinion in this case), is the first circuit to take a *Patterson*-style[9] approach to Section 1981 in the retail contract setting. By following the Eighth Circuit, the

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[8]Alleging shoplifting.

[9]Pre-Civil Rights Act of 1991.

Fifth Circuit also restricts § 1981 beyond clear language of the amended statute. 42 U.S.C. §1981. The Eighth and Fifth Circuits take an especially narrow view when they hold that §1981 prevents discrimination only in denying entry into retail contracts, but not in enforcing contracts. That view has previously been overturned by Congress, and conflicts with the other Circuits that have addressed § 1981 in the retail and commercial setting.

III. "Whether 42 U.S.C. §1981 proscribes discrimination in all phases of contractual relationships, including after entry into retail contracts, as it does after entry into employment contracts?" Is An Important Issue That Merits This Court's Attention

Civil Rights laws are important affirmations of "our society's deep commitment to the eradication of race-based discrimination. *Patterson v. McLean Credit Union*, 491 U.S. 164, 164, 109 S.Ct. 2363, 2367 (1989). "[E]very pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination." *Bob Jones University v. United States*, 461 U.S. 574, 593 (1983); see also *Brown v. Board of Education*, 347 U.S. 483 (1954); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896). The Eighth Circuit decision in this case declares that one may discriminate against a black man because of his race (by denying him the benefit of his contract) so long as the discrimination is timed to occur just after allowing him to enter the contract.

IV. This Case Provides the Court with an Opportunity to Compare Conflicting Opinions from the Eighth and Tenth Circuits, Both Currently Before this Court on Petition for Writ of Certiorari, and Both Involving § 1981 in Retail Contractual Relationships

By granting certiorari, the Court can resolve a conflict between the Circuits, and prevent conflicting application of § 1981 in the various District Courts around the country. Two cases, from neighboring Circuits, with conflicting interpretations of § 1981, as applied to retail contracts, are presently before this Court on petition for writ of certiorari. This case from the Eighth Circuit, conflicts with a case from the Tenth Circuit on petition for certiorari, *Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091 (10th Cir.2001). *Hampton* holds that the contractual relationship does not end once a consumer pays for and receives merchandise, and that the question of what constitutes a benefit of a retail contract is a question of fact for the jury. By resolving the conflict between the two immediate cases, the Court can set precedent for lower courts, and avoid confusion (and further appeals) regarding the interpretation of § 1981.

V. The Eighth Circuit Disregards The Federal Rules of Civil Procedure For Summary Judgment

In reaching its determination, the Eighth Circuit took away from the jury the question of what constitutes a benefit of the contract, and in doing so accepted the allegations of fact set forth by Hy-Vee. *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 853 (8th Cir. 2001)[A-14]. All of Hy-Vee's substantive allegations were disputed by Youngblood (and by Hy-Vee's own employees). See, *Id.* at 858 (R. Arnold, J. dissenting)[A-13]; *Youngblood v. Hy-Vee Food Stores, Inc.*, No. 99-0629- CV-W-2-ECF, slip op. at 24 (W.D.Mo. Dec. 15, 2000)[A-33]. Yet, two of the three Circuit panel judges chose to adopt Hy-Vee's allegations (regarding probable cause) as fact, despite this Court's well-established precedent to the contrary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251, 106 S.Ct. 2505, 91 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986); Fed. R. Civ. P. 56.

The panel also violated the cardinal rule of not deciding questions of fact, when it determined that the right to leave the store with the item Youngblood purchased was not a benefit of the retail contract. *Hampton* at 1099.

Hy-Vee's disputed version of the facts was intended to downplay Hy-Vee's conduct and cast aspersions on Youngblood. By fabricating its allegation that Youngblood was suspected of shoplifting, Hy-Vee attempted to vilify Youngblood and divert attention from Hy-Vee's reprehensible conduct. Hy-Vee apparently did so to promote an outcome-driven opinion which contradicts the weight of §1981 law.

In his dissent, Senior Circuit Court Judge, Richard S. Arnold, correctly states the standard for evaluating contested factual allegations, and summarizes the evidence in this case:

> Accepting Youngblood's version of the facts (which we must for present purposes) racial discrimination pervaded the entire contracting process, not just the moment that Youngblood exchanged money for [merchandise]. Youngblood was singled out for surveillance by the store clerk before he made his purchase, singled out for suspicion as he walked to the register to make his purchase (when the store clerk alerted the manager), and singled out for detention by three store employees as he tried to leave the store with his purchase. In short, the entire contracting process--from the time Youngblood entered the store until the time he was prevented from leaving with the [merchandise] he had paid for--was tinged with racial discrimination..." *Youngblood*, at 859.

Judge Arnold further cuts through HyVee's attempts to cloud

the issue:

> In this case, we are not presented with the question of Youngblood's guilt or innocence of shoplifting. (The criminal case against him was dismissed.)[10] Rather, we are faced with determining when victims of racial discrimination can bring suit under §1981. *Id.*

Hy-Vee's story is intended to trivialize Youngblood's claim for denial of his civil rights to contract, and to create doubt as to whether Youngblood is deserving of §1981 protection, in the minds of those who would judge Hy-Vee's actions. Under the facts presented in the record by Youngblood, there can be no probable cause for suspicion of shoplifting.[11] A jury must determine the ultimate facts as to whether Hy-Vee could reasonably suspect Youngblood of shoplifting, or if Hy-Vee's story is a pretext for hiding its overt racial discrimination. *Ornelas v. United States*, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662 (1996).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition for a writ of *certiorari*.

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[10]On the merits.

[11]In relying on the police officer's testimony that he observed a package that "appeared to be crammed full," the Circuit Court fails to consider that the officer did not know how full the package should appear, did not count or weigh its contents, did not establish a chain of custody, and relied on Hy-Vee's manufactured allegations for the theory that Youngblood must have combined contents from two packages.

Respectfully Submitted,

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APPENDIX

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-3980.

Carl Youngblood, Appellant,	*	Appeal from the United States District Court for the Western District of Missouri
v.	*	
Hy-Vee Food Stores, Inc., Appellee	*	

Submitted: June 15, 2001
Filed: September 17, 2001

BEFORE: McMILLIAN and RICHARD S. ARNOLD, Circuit Judges, and DAWSON,[1] District Judge.

DAWSON, District Judge.

Carl Youngblood, an African-American, instituted a civil rights action against Hy-Vee Food Stores, Inc. (Hy-Vee), asserting that Hy-Vee violated his rights under 42 U.S.C. §§ 1981 and 1983 and also subjected him to malicious prosecution and false imprisonment when they detained him on suspicion of shoplifting and had him arrested and pressed charges against

[1]The Honorable Robert T. Dawson, United States District Judge for the Western District of Arkansas, sitting by designation.

him. The district court[2] granted Hy-Vee summary judgment, concluding that Hy-Vee's actions did not deprive Youngblood of his right to contract under Section 1981, as Youngblood had completed his purchase; that Hy-Vee did not violate the full-and-equal-benefits clause of Section 1981, as its actions constituted private and not state action; that because Hy-Vee's actions did not constitute state action, Youngblood's Section 1983 claim likewise failed; and that Youngblood could not establish malicious prosecution or false imprisonment, as there was probable cause for his arrest and his detention was reasonable.

On appeal, Youngblood argues that the contract rights protected by Section 1981 include the right to the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship, and that the district court therefore erred in concluding that Section 1981 provided Youngblood no protection once he completed the contract by making his purchase. Youngblood further argues that the full-and-equal-benefits clause of Section 1981 applies to private actors, and that, in any event, Hy-Vee acted under color of state law so as to implicate Youngblood's rights under both Sections 1981 and 1983. Finally, Youngblood argues that probable cause did not exist to arrest him and thus, summary judgment was inappropriate on his malicious- prosecution and false-imprisonment claims.

For reasons stated herein, we AFFIRM the decision of the district court.

I. Background.

On or about April 13, 1998, Youngblood entered Hy-Vee and proceeded to the section of the store that contained canisters of beef jerky. Youngblood spent some time in this

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[2]The Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western district of Missouri.

area before selecting a canister and walking up the aisle towards the check-out area. A store employee observed Youngblood and thought his behavior unusual for it appeared to the employee that Youngblood had his hands underneath his shirt. After taking a few steps up the aisle, Youngblood turned and returned to the beef-jerky section, placed the original canister back on the shelf and picked up another canister. It appeared to the store employee that Youngblood placed the second canister underneath his shirt. Youngblood then proceeded to the cash register and purchased a single canister of beef jerky. The store employee checked the canister Youngblood placed back on the shelf and discovered that most of the beef jerky inside was missing. As Youngblood headed toward the exit, the employee stopped Youngblood and asked for his receipt. Youngblood gave him the receipt and his bag. The store employee opened the canister Youngblood had purchased and observed that it was "crammed full" of beef jerky. The stop of Youngblood in the front of the store lasted two to five minutes and Youngblood then waited in an upstairs office for approximately twenty minutes until the police arrived. The door to the office remained open during this time and Youngblood was not physically restrained in any manner. When the police officer arrived, he asked what Youngblood had done and the store employee told the officer that Youngblood had taken most of the contents of one beef-jerky canister and placed it into another. After examining the contents of the canister, the officer arrested Youngblood. The criminal charges against Youngblood were ultimately dismissed.

II. Discussion.

We review the district court's grant of summary judgment de novo. *See, Beck v. Skon,* 253 F.3d 330, 333 (8th Cir.2001). We reverse an award of summary judgment only if we find that a material issue of fact exists or that the district court made an

incorrect conclusion of law. *See* Fed.R.Civ.P. 56(c). In deciding whether Hy-Vee is entitled to summary judgment, we view the summary judgment record in a light most favorable to Youngblood, affording him the benefit of all reasonable inferences. *See Tlamka v. Serrell,* 244 F.3d 628, 632 (8th Cir.2001).

A. Section 1981's Right-to-Contract Clause

Section 1981 provides that all persons shall have the same right to "make and enforce contracts." *See* 42 U.S.C. § 1981(a). In 1991, Congress expanded the scope of Section 1981 to include the right to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *See* 42 U.S.C. § 1981(b). Hy-Vee removed the beef jerky from Youngblood after the point of purchase and Hy-Vee did not refund Youngblood's money even after the charges against him were dismissed. Hy-Vee further did not return the beef jerky to Youngblood as Hy-Vee discards all damaged items associated with a suspected shoplifting. The question we must determine is whether any contractual relationship remained once Youngblood completed his purchase and if the taking of the beef jerky denied Youngblood a benefit of the contractual relationship.

While there is scant precedent, courts that have addressed the issue have concluded that once the purchase is completed, no contractual relationship remains. *See e.g., Lewis v. J.C. Penney Co. Inc.,* 948 F.Supp. 367, 372 (D.Del.1996); *see also Rogers v. Elliott,* 135 F.Supp.2d 1312, 1315 (N.D.Ga.2001). Youngblood correctly points out that in these cases the customers did not have the merchandise they purchased taken away. This distinction is of little significance, however, as the key is whether any contractual duty remained after Youngblood made his purchase. Once Youngblood paid the cashier and received the beef jerky from the cashier, neither party owed the other any duty under the retail-sale contract. This case is

distinguishable from *Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091 (10th Cir.2001), where the Tenth Circuit found a contractual relationship existed after the purchase. In *Hampton,* the customer received a coupon for a fragrance sample as a benefit of her purchase and the Tenth Circuit concluded that the store had a contractual duty to allow the customer to redeem the coupon. *See id.* at 1103-05. In this case, nothing that happened after the sale created any further contractual duty on Hy-Vee's part. Accordingly, Hy- Vee cannot be said to have deprived Youngblood of the benefit of any contractual relationship, as no such relationship existed when it took the beef jerky away from Youngblood.

The dissent suggests that Youngblood was blatantly discriminated against in this case. While we disagree, Section 1981 does not provide a general cause of action for race discrimination if in fact it occurred. The requirement remains that a plaintiff must point to some contractual relationship in order to bring a claim under Section 1981. This conclusion does not mean that there is no remedy in cases where a store wrongfully confiscates items purchased by a customer. The nature of the action, however, is not in contract, but in tort. Specifically, under Missouri law, a cause of action for conversion lies for the tortious taking of a chattel. *See Koger v. Hartford Life Ins. Co.,* 28 S.W.3d 405, 415 (Mo.Ct.App.2000).

B. Section 1981's Full-and-Equal-Benefit Clause

Section 1981 provides that all persons shall have the right to "the full and equal benefit of all laws and proceedings for the security of persons and property." 42 U.S.C. § 1981(a). "Because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law." *Chapman v. Higbee Co.,* 256 F.3d 416, 2001 WL 753504, *3 (6th Cir. July 5, 2001); *see also Mahone v. Waddle,* 564 F.2d 1018, 1029 (3d Cir.1977) (concept of state action is implicit in

full-and-equal-benefit clause), *cert. denied,* 438 U.S. 904, 98 S.Ct. 3122, 57 L.Ed.2d 1147 (1978). As discussed below, Hy-Vee's actions did not constitute state action and Hy-Vee was therefore entitled to summary judgment on Youngblood's claim under the full-and-equal-benefit clause.

C. Section 1983

Only state actors can be held liable under Section 1983. *See Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). A private party who willfully participates in joint activity with the State or its agents is considered a state actor. *See id.* at 152, 90 S.Ct. 1598. A store may be considered to be acting jointly with police when the police detain accused shoplifters without making an independent investigation or pursuant to a customary plan between the store and the police department. *See Murray v. Wal-Mart, Inc.,* 874 F.2d 555, 558-59 (8th Cir.1989). In *Murray,* the court found that Wal-Mart acted in concert with the police because Wal-Mart had a practice of working with the police department in prosecuting shoplifters; the store security guard was an employee of the police department; and the police relied on the guard's incomplete version of the facts without any independent investigation. *See id.* at 559.

The present case is distinguishable from *Murray,* as the store employee who witnessed the incident was not employed by the police department and the police officer summoned to the scene investigated the incident by speaking with the store employee and examining the contents of the beef jerky canister. Youngblood relies on a state statute which authorizes merchants to detain suspected shoplifters in a reasonable manner and for a reasonable length of time to investigate whether there has been a shoplifting, *see* Mo.Rev.Stat. § 537.125 (2000), and argues that as Hy-Vee acted under this statute, its conduct constituted state action. The Supreme Court has held that a private party's mere invocation of state legal

procedures does not constitute state action. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 n. 21, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982); *cited in Miller v. Compton*, 122 F.3d 1094, 1098 (8th Cir.1997).

D. State-Law Claims of Malicious Prosecution and False Imprisonment

The district court properly granted Hy-Vee summary judgment on these claims, as probable cause existed to suspect Youngblood of shoplifting. *See Jacobs v. Bonser*, 46 S.W.3d 41, 49 (Mo.Ct.App.2001) (to make submissible case of malicious prosecution, plaintiff must show lack of probable cause for prosecution); *Edwards v. McNeill*, 894 S.W.2d 678, 683 (Mo.Ct.App.1995) (probable cause is complete defense to cause of action for false arrest). A store employee thought he observed Youngblood put a canister of beef jerky under his shirt, then return that canister to the shelf and place another one under his shirt. The employee examined the can placed back on the shelf and only a couple of pieces remained in it. When the employee examined the canister Youngblood had purchased, it appeared to be "crammed full." These facts provided "reasonable grounds for suspicion, supported by circumstances ... sufficiently strong to warrant a cautious man in his belief" that Youngblood had committed the offense of shoplifting. *See Thompson v. Wal-Mart Stores Inc.*, 890 S.W.2d 780, 782 (Mo.Ct.App.1995).

III. Conclusion.

Based on the foregoing, we hereby affirm the district court's rulings in their entirety.

RICHARD S. ARNOLD, Circuit Judge, dissenting.

Under 42 U.S.C. § 1981, all persons in the United States have the same right "to make and enforce contracts." 42 U.S.C. § 1981(a). In 1991, Congress amended the statute to explain

that this clause includes the right to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." § 1981(b). Our job is to decide what rights are conferred by this statute.

The statute, in its entirety, reads as follows:

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

The Court holds in this case that a customer (Youngblood) who is detained by employees of a retail store (Hy-Vee) immediately after he has paid for a consumer item, who has that item taken from him by those employees, and who is not refunded the money with which he purchased the item--all of which events occur on the store premises--cannot maintain an action under § 1981 based on his right to enjoy the "benefits" of the contractual relationship. § 1981(b). The Court reasons

that at the time of these events, no contract existed between Youngblood and Hy-Vee because the retail sale had been concluded.[3]

Underlying the Court's reasoning is a narrow view of the scope of the contract right conferred by § 1981. There are several reasons to think that this view is too narrow, and that Congress actually conferred a more expansive right under the statute.

First, the language of the statute itself--particularly the detailed explanatory language of subsection (b)--is broad and inclusive. Subsections (b) and (c) of the statute are recent amendments that were enacted as part of the Civil Rights Act of 1991, Pub.L. 102-166, 105 Stat. 1071. By its terms, subsection (b) interprets § 1981's "make and enforce contracts" clause to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." § 1981(b). Moreover, the Act's statement of purposes explicitly describes the Act as "*expanding* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991 § 3(4) (emphasis added). Therefore, as a matter of statutory construction, the "make and enforce contracts" clause is to be interpreted broadly.

Second, the legislative history of the recent amendments confirms what the statutory language implies--that Congress

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[3]In the Court's words, "[o]nce Youngblood paid the cashier and received the beef jerky from the cashier, neither party owed the other any duty under the retail-sale contract." *Ante,* at 854. As a result, the Court determines, "Hy-Vee cannot be said to have deprived Youngblood of the benefit of any contractual relationship, as no such relationship existed when it took the beef jerky away from Youngblood." *Id.* at 854-55. Instead of an action under § 1981, the Court suggests, Youngblood has a state-law action for conversion. *Id.* at 855.

intended to broaden the scope of the contract right conferred by the statute. As the House Report to the Act indicates, "[t]he list set forth in subsection (b) is intended to be illustrative rather than exhaustive." H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 92 (1991), reprinted in 1991 U.S.Code Cong. & Admin. News 549, 630. Moreover, Congress passed subsection (b) specifically in response to the Supreme Court's narrow construction of the "make and enforce contracts" clause in *Patterson v. McLean Credit Union,* 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). *See Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 114 S.Ct. 1510, 128 L.Ed.2d 274 (1994) (discussing amendment of § 1981). In *Patterson,* an employment discrimination case, the Court held that the clause did not provide employees with a cause of action for discrimination occurring after the formation of an employment contract. 491 U.S. at 171, 109 S.Ct. 2363. The House Report demonstrates Congress's disagreement with such a limited reading of the statute. See H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 92 (1991), reprinted in 1991 U.S.Code Cong. & Admin.News 549, 630 ("The Committee ... finds that the Court's interpretation [in *Patterson*] of one of our most important federal civil rights laws [§ 1981] crippled the statute's deterrent value.... As a consequence, the Committee concludes that there is a compelling need for legislation to overrule the *Patterson* decision and ensure that federal law prohibits all race discrimination in all phases of the contractual relationship."). Accordingly, § 1981 now covers "all phases and incidents of the contractual relationship." *Rivers,* 511 U.S. at 302, 114 S.Ct. 1510.

Third, civil rights legislation--such as § 1981, which is designed to address invidious racial discrimination--is generally interpreted broadly in keeping with its remedial purpose. It is written in general language with the understanding that courts have wide latitude in construing it to

achieve the remedial purposes that Congress identifies. See, *e.g., Patterson,* 491 U.S. at 171, 174, 109 S.Ct. 2363 (reaffirming *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), and discussing "our society's deep commitment to the eradication of discrimination based on a person's race or the color of his or her skin"); *Bob Jones University v. United States,* 461 U.S. 574, 593, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) ("[E]very pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination."); see also *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting) ("The law regards man as man, and takes no account of his ... color when his civil rights as guaranteed by the supreme law of the land are involved."). Failing to construe § 1981 liberally could remove certain racially discriminatory conduct--conduct that Congress intended to prohibit--from the purview of the statute.

Fourth, what case law there is on § 1981 is not inconsistent with a broad reading of the statute. The particular question at issue--the scope of the contract right conferred by the statute in the context of a retail sales contract--has not appeared before in this circuit or elsewhere. None of the cases cited by the Court to the contrary is persuasive. In *Lewis v. J.C. Penney Co.,* 948 F.Supp. 367 (D.Del.1996), the plaintiff was stopped and questioned by a security guard, but was permitted to leave with her purchase following the inquiry. *Id.* at 369-70. The court noted that the result might have been different (in fact, had been different in an earlier case) had there been a policy of treating customers differently based on race. In *Rogers v. Elliott,* 135 F.Supp.2d 1312 (N.D.Ga.2001), the plaintiffs were harassed by an individual cashier in a Wal-Mart store after making their purchase (which they kept), and there is no

indication that any discriminatory intent existed on the part of anyone other than the cashier. *Id.* at 1313. Finally, in *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091 (10th Cir.2001), the court allowed the § 1981 claim to proceed, recognizing that the plaintiff's ability to redeem a coupon given to her when she made her purchase was a benefit of the sales contract. *Id.* at 1103-05.

There is evidence of racial discrimination in this case. The District Court determined that Youngblood had produced enough evidence to show Hy-Vee's discriminatory intent, *Youngblood v. Hy-Vee Food Stores, Inc.*, No. 99-0629- CV-W-2-ECF, slip op. at 24 (W.D.Mo. Dec. 15, 2000), and statements in the record confirm this determination. Regarding Hy-Vee's practices, there is evidence from several former store employees that Hy-Vee had a discriminatory pattern and practice of targeting, surveilling, stopping, and prosecuting black customers disproportionately to white customers. See Appellant's Appendix at 704, 709-10, 713-14.

Regarding the incident itself, Youngblood states that while he was being detained upstairs in the store, he was prevented from making a telephone call, and Hy-Vee employees were laughing and smirking. *Id.* at 429, 430. When he suggested that there was nothing funny about the situation, a Hy-Vee manager said: "I see a whole lot funny about it." *Id.* at 429. When Youngblood asked for his money back, he was told by the manager: "You and your people have to pay back double the amount." *Id.* at 430.

Given this background, I conclude that Hy-Vee's alleged actions come within § 1981, and that Youngblood should be allowed to proceed with his suit. A person's right to leave a store where he has purchased an item without being surrounded, detained, and having the item removed from his possession (and his money not returned) can easily be understood as a "benefit" of the contract. *Cf. Perry v.. Burger*

King Corp., 924 F.Supp. 548, 552 (S.D.N.Y.1996) (denying motion to dismiss where customer finished and paid for meal and sought to use restaurant's restroom; noting that plaintiff may be "considered to have contracted for food *and* use of the bathroom" as benefit of contractual relationship).

Accepting Youngblood's version of the facts (which we must for present purposes) racial discrimination pervaded the entire contracting process, not just the moment that Youngblood exchanged money for beef jerky. Youngblood was singled out for surveillance by the store clerk before he made his purchase, singled out for suspicion as he walked to the register to make his purchase (when the store clerk alerted the manager), and singled out for detention by three store employees as he tried to leave the store with his purchase. In short, the entire contracting process--from the time Youngblood entered the store until the time he was prevented from leaving with the beef jerky he had paid for--was tinged with racial discrimination, if Youngblood's evidence is believed. Given § 1981's remedial purpose, whether Youngblood had been detained and the beef jerky seized prior to his paying for it, as he was paying for it, or as he was heading for the exit with it should not make a difference under § 1981.

Finally, it is important to separate the question of guilt and innocence from the question of whether a civil rights violation has occurred. In this case, we are not presented with the question of Youngblood's guilt or innocence of shoplifting. (The criminal case against him was dismissed.) Rather, we are faced with determining when victims of racial discrimination can bring suit under § 1981. The statute protects the guilty as well as the innocent from racially discriminatory practices. Thus, while it is certainly the case that the innocent should not be singled out for arrest because of their skin color, it is equally the case that the guilty should not be singled out for suspicion,

investigation, and arrest simply because of their skin color.

For these reasons, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CARL YOUNGBLOOD, Plaintiff,	)	
v.	)	Case No. 99-0629-CV-W-2-ECF
HY-VEE FOOD STORES, INC., Defendant.	)	

ORDER

Currently pending before the Court is defendant's Motion for Summary Judgment (Doc. # 53), plaintiff's Motion to Strike Defendant's Motion for Summary Judgment (Doc. # 69), plaintiff's Motion for Leave to Supplement Exhibit Attachment (Doc. # 67), plaintiff's Motion to Amend Exhibit List (Doc. # 77); plaintiff's Motion to Amend Witness List (Doc. # 78), plaintiff's Motions in Limine (Docs. # 83, 85, 87, 89, 91, 93, 95, 97, 99 and 101), defendant's Motions in Limine (Docs. # 119, 120, 121, 122, 124, 125, 126, 127, 128, 129, 130, 131), plaintiff's Motion to Amend Exhibit Attachment to His Suggestions in Opposition to Defendant's Motion for Summary Judgment (Doc. # 135) and plaintiff's Motion for Leave to File Supplementation to Plaintiff's Suggestions in Opposition to Defendant's Motion in Limine to Exclude Certain Canisters of Beef Jerky (Doc. # 147).

I. BACKGROUND

On April 13, 1998, plaintiff, Carl Youngblood, a seventeen year old African-American male entered the Hy-Vee grocery store located on Barry Road in Kansas City, Missouri in order to get some beef jerky. After asking an employee where the beef jerky was located, plaintiff spent approximately five

minutes looking at the different types of beef jerky. Plaintiff weighed the different canisters of beef jerky in his hands and examined the prices. Plaintiff then selected a cannister of beef jerky and started walking up the aisle.

While working in the meat department, Hy-Vee employee Sheldon McVey saw plaintiff standing in front of the beef jerky section. It appeared to Mc Vey that plaintiff had his hands underneath his shirt. McVey thought this behavior was unusual and continued to observe plaintiff as he was concerned that plaintiff might be attempting to shoplift.

After walking a few steps away from the beef jerky section, plaintiff turned around and walked back to the beef jerky section. Plaintiff put the original cannister back on the shelf and picked up another cannister. McVey testified that plaintiff appeared to put the second cannister underneath his shirt. Plaintiff then proceeded up to the cash registers where he paid for a single cannister of beef jerky with a ten dollar bill.

McVey watched plaintiff walk toward the registers and McVey went to the beef jerky section and picked up the cannister he had seen plaintiff put back on the shelf. McVey opened the cannister and discovered that there was no foil seal on the cannister and that it had only two or three pieces of beef jerky inside. McVey took the cannister and followed plaintiff to the front of the store. While plaintiff was standing in the checkout line, McVey paged a manager, Todd Wagner, from a phone located at one of the registers. McVey told Wagner that he suspected plaintiff had beef jerky underneath his shirt. McVey then met Wagner at the front of the store and they waited at the end of a register located a few aisles away from where the plaintiff was checking out.

McVey and Wagner stopped plaintiff as he was heading toward the exit and asked for plaintiff's receipt. Plaintiff then handed over his receipt and his bag. Plaintiff alleges that he was asked by one of the employees to lift up his shirt, which he

did for a brief period of time, to show that there was nothing under his shirt. McVey then took the cannister out of the bag and opened it. When the cannister was opened, McVey and Wagner saw that it was "crammed full"of beef jerky. Plaintiff testified that he does not recall whether the Hy-Vee employees opened the canister of beef jerky. McVey believed that this cannister contained more beef jerky than it should have. The stop of plaintiff in front of the store lasted only two to five minutes. After this, plaintiff was asked to go to an upstairs office with the Hy-Vee employees. Hy-Vee called the police department at 5:50 p.m. and reported a suspected shoplifting. Plaintiff was asked to sit in a chair in an upstairs office while the Hy-Vee employees waited for the police to arrive. The door to the office remained open during this time and plaintiff was not physically restrained in any way. Plaintiff alleges that when he asked if he could have his money back, he was told by Wagner that "you and your people have to pay back double the amount." Plaintiff also alleges that while upstairs, the employees were laughing and smirking. Plaintiff alleges that he said he did not see anything funny about the situation. Plaintiff claims that the manager then said: "I see a whole lot funny about it." At 6:10 p.m. Officer Lonnie Price arrived at Hy-Vee. Plaintiff claims that when Officer Price asked who the accused was, Wagner responded "That boy right there." Officer Price then asked the employees what plaintiff had done and McVey told Officer Price that plaintiff had taken the contents of one cannister and placed it into another cannister.

Plaintiff was then arrested and taken to the police station. Plaintiff was in a holding cell for less than an hour until his brother picked him up. Plaintiff appeared as a defendant in a criminal proceeding in municipal court on July 30, 1998. McVey appeared and testified. The criminal charges against plaintiff were dismissed. Pursuant to Hy-Vee's policies for stopping suspected shoplifters, the employee-witness must be

certain that the person committed the act and must not have lost contact with the suspect before stopping the person after the point of sale. Hy-Vee also requires employees to contact a manager before stopping anyone. Hy-Vee maintains records concerning stops of individuals suspected of shoplifting. These records indicate that Hy-Vee stopped a total of 53 individuals for suspected shoplifting between December 1996 and August 1999. Forty-five of these individuals were white, four were African-American, including plaintiff and three were Hispanic.

Pursuant to Hy-Vee's procedures, the police are called on all suspected shoplifters, except for those who do not have the mental capacity to know what they are doing is wrong, such as the very old or the very young. Plaintiff alleges that of all the people who were caught shoplifting, Hy-Vee did not call the police on twenty occasions. Plaintiff claims that of these twenty, only one was African-American.

II. DISCUSSION

A. Plaintiff's Motions to Supplement His Exhibit Attachments

Before analyzing plaintiff's claims, the Court first addresses some procedural matters which affect the Court's consideration of the summary judgment motion. Defendant in its Reply Suggestions argues that the Court cannot rely on several of plaintiff's Exhibits because these exhibits are either unauthenticated or are inappropriate witness statements.

In response plaintiff has filed two motions for Leave to Supplement His Exhibit Attachment to His Suggestions in Opposition to Summary Judgment (Docs.# 67 and #135). In his first motion, plaintiff states that he seeks to supplement Exhibits C, D, U, V, W and X by supplying additional authenticating documentation for these exhibits. Plaintiff also seeks additional time to obtain the statement of a witness who is presently unavailable, to support the facts in Exhibit AA.

1. Exhibits C (Police Call Records) and F (Summary of

Calls)

Plaintiff states that Exhibits C is authenticated, but plaintiff simply omitted the authenticating document for this exhibit. Plaintiff states that Exhibit F is a summary of Exhibit G for demonstrative purposes and that Exhibit F is intended to condense the information for ease of review. Plaintiff asserts that it need not be authenticated.

In opposition to plaintiff's motion, defendant states that the affidavits supplied by plaintiff fail to bring these exhibits into compliance with Fed.R.Civ.P. 56. For Exhibit C, plaintiff submitted the Affidavit of Judith Robinette, an employee of the Kansas City Police Department. Ms. Robinette explains in her Affidavit that she has access to and maintains records regarding calls to the Kansas City Police Department. She states that the attached eleven pages are excerpts of call records which were kept in the normal course of business. However, there is no explanation of these records or the information which is contained in them.

Exhibit C is a listing of Dispatch Activity at the Hy-Vee store for the years 1997, 1998 and 1999. One category lists the Type of Call. Some of the calls are noted as "Stealing" calls and other calls are noted as "Hold Person Shoplifting." However, there is no explanation in Ms. Robinette's affidavit of what these categories mean or how they differ. Plaintiff uses the information provided in these records to create the first two pages of Exhibit F "Summary of Shoplifting or Stealing Calls Made to Police Where No Corresponding Hy-Vee Incident Report Produced."[4] Plaintiff relies on these exhibits in his

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[4]In his Motion to Supplement, plaintiff alleges that Exhibit F is a summary ofExhibit G for demonstrative purposes. Exhibit F actually consists of two, two-page documents the first which is entitled: "Summary of Shoplifting or Stealing Claims Made to Police Where No Corresponding Hy-Vee Incident Report Produced" and "Summary of Hy-Vee Incident Reports Produced." The Summary of Shoplifting Claims document appears

suggestions in opposition to the Motion for Summary Judgment to show that in the years 1997-1999, there were 84 calls to the police for either stealing or shoplifting, but that Hy-Vee only produced incident reports for 37 of the 84 calls to police during this same time period. Plaintiff then goes on to state that Hy-Vee did not produce the incident report for plaintiff or for at least one other African-American who was stopped.

As defendant notes, plaintiff has failed to provide an affidavit from anyone with personal first hand knowledge explaining what the documents mean or the information which is contained in them. Without this, defendant states that the information is meaningless and the assertions made by plaintiff are "unsupported assumptions and conjecture." (Defendant's Suggestions in Opposition, p. 2). As defendant notes, a notation of "Stealing" in the police call records could mean any number of things, such as employee theft, theft from the store's loading dock, theft from a storeroom, theft from a customer's car in the parking lot or theft of a customer's property while on Hy-Vee premises. As the Court in *O'Bannon v. Union Pacific R. Co.*, 960 F.Supp. 1411, 1418 (W.D.Mo. 1997), noted:

> [d]ocumentary evidence must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.
> ...In evaluating evidence related to possible summary judgment, a court may not consider affidavits that do not satisfy the requirements of

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to have been made by comparing the list of calls to police with the list of Incident Reports supplied by Hy-Vee.

Rule 56(e).

In that case, the Court struck portions of an affidavit because the affiant relied on another exhibit for factual support. That exhibit was a handwritten logsheet with unexplained abbreviations. The Court struck that portion of the affidavit because the affiant failed to explain what the handwritten logsheet was or what the codes and abbreviations meant and also failed to state that the affiant knew the exhibit was genuine. Id. at 1419.

The Court finds that plaintiff's Exhibits C and F do not comply with Rule 56 and thus will not be considered by the Court in ruling on the summary judgment motion.

2. Exhibit D (Hand-drawn Diagram of Hy-Vee store)

Plaintiff states that the authenticating document for this exhibit, an Affidavit from an individual identified as Steve Weinberg was also omitted from plaintiff's original suggestions in opposition to the Motion for Summary Judgment. The Affidavit of Mr. Weinberg states that he went to the Hy-Vee store on March 15, 2000 to create a scale diagram of portions of the store. He states that he made preliminary drawings and took measurements of the premises for the purpose of creating the diagram. He then states that the attached diagram is a fair and accurate representation of the Hy-Vee store, drawn to scale and based on his measurements.

Defendant objects to this Affidavit as improper under Rule 56. Defendant notes that plaintiff's summary judgment opposition was the first time that plaintiff provided this Exhibit or the affidavit to defendant and that neither the diagram nor Mr. Weinberg's identity were provided before the close of discovery.[5] Defendant also notes that Mr. Weinberg's affidavit

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[5]The Plaintiff asserts however that Mr. Weinberg was introduced to defendant's counsel on March 15, 2000 at the Hy-Vee store. However,

constitutes expert proof and that Mr. Weinberg was never disclosed as an expert witness. The Court agrees and finds that this affidavit should be excluded because plaintiff failed to produce either the diagram or the affidavit before the close of discovery. Additionally, the Court notes that the Affidavit fails to provide Mr. Weinberg's qualifications or describe in any detail the method he employed in making the diagram or indeed even what scale the diagram is drawn to. For these reasons, Exhibit D will not be considered by the Court.

3. Witness Statements (Exhibits U, V, W and X).

In his Motion to Supplement, plaintiff's counsel states that the statements of these individuals were obtained by sworn depositions before a Certified Court Reporter. Plaintiff's counsel states that he obtained these statements by deposition so that there would be no question as to their credibility. The depositions all state that they were taken pursuant to notice and that there was no appearance for the defendant. Plaintiff's counsel states that he has compiled the court reporters' signed certifications for these depositions and moves for leave to file them. Plaintiff's counsel asserts that the certifications show that the reporter is a notary public authorized to take depositions and that the statements were sworn testimony. Plaintiff's counsel cites the case of Diamonds Plus, Inc. v. Kolber, 960 F.2d 765, 768-69 (8th Cir. 1992) for the proposition that depositions are at least as good as affidavits and may be used whenever an affidavit would be permissible, even though the deposition would not be admissible at trial.

Defendant states that although the statements contained in Exhibits U, V, W, and X were taken in deposition form, they

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plaintiff does not state whether Mr. Weinberg was identified in his Rule 26 Disclosures or whether Weinberg's affidavit was provided to defendant before being included in Plaintiff's Suggestions in Opposition to the Summary Judgment motion.

may not be relied upon because plaintiff failed to give defendant any notice that these depositions were being taken. Defendant additionally asserts that these statements should be stricken because they are unsigned, and there is no provision for waiver of signature on an affidavit. Finally, defendant states that the statements should not be considered because they contain only conclusory allegations and are not based on any personal first hand knowledge.

Courts have noted that depositions need not be admissible at trial in order to be properly considered in deciding a motion for summary judgment. In Shrewsbury v. State Farm Mutual Auto. Ins. Co., No. 95-4183-RDR, 1997 WL 104113 (D.Kan. Feb. 5,1997), the Court stated:

> The law is generally settled that deposition testimony can be considered as an affidavit for the purpose of deciding a motion for summary judgment. See, e.g., RSBI Aerospace, Inc. v. Affiliated FM Insurance Co., 49 F.3d 399, 403 (8th Cir. 1995); Hoover v. Switlik Parachute Co., 663 F.2d 964, 966-67 (9th Cir. 1981). In deciding to consider a deposition as an affidavit, the courts generally note that the deposition estimony met the requirements for an affidavit since the deponent was under oath, testified about matters of personal knowledge, and signed he deposition.

Id. at *4. Defendant argued in Shrewsbury that the deposition should not be onsidered because the parties had not had an opportunity to complete the eposition and the deponent never signed the deposition. The court held that there as no reason to believe that the sworn answers provided by the deponent were any ess reliable than an affidavit and concluded that the deposition testimony could be considered in deciding the motion. See also, The Home Insurance Co. v. Powell, No.

Civ.A 95-6305, 1997 WL 370109, *7, n. 10 (E.D.Pa. June 13, 1997), aff'd, 156 F.3d 1224 (3d Cir.1998)(deposition could be considered in motion for summary judgment even though defendant was not present or represented at the taking of the deposition and not given notice). See also, RSBI Aerospace, Inc. v. Affiliated FM Ins.Co., 49 F.3d 399, 403 (8th Cir. 1995). Accordingly, the Court finds that even though these depositions were taken without notice to the other side, they can be considered in deciding the motion for summary judgment.

4. Witness Statement of Will Lacy

In his first motion, plaintiff's counsel states that this witness is unavailable. However, plaintiff's counsel states that Mr. Lacy's step-mother has firsthand knowledge of what she observed in Hy-Vee and was made aware of how her son was treated. Plaintiff's counsel asks the court to consider the facts of Will Lacy as presented through the affidavit of Susan Thomas, his step-mother. Defendant objected to this on the basis of hearsay.

In his Second Motion to Supplement his Exhibit Attachment, plaintiff's counsel states that he has obtained the affidavit of Mr. Lacy and seeks leave to file the same. Defendant objects on the basis that the supplement is untimely and also on the basis that the allegations of Mr. Lacy's discrimination by Hy-Vee are immaterial and do not tend to prove that plaintiff, a suspected shoplifter was discriminated against in this case.

As to the timeliness in submitting the affidavit, the Court finds that plaintiff's counsel previously indicated that Mr. Lacy was unavailable and was only recently able to locate Mr. Lacy and obtain his affidavit. As to the substance of Mr. Lacy's affidavit, while he does describe an incident in which he personally was accused of stealing money from a customer in the store, he also describes his observations of Hy-Vee managers following African-American shoppers and treating

them differently than white customers were treated. Mr. Lacy also describes his observations of Hy-Vee managers stopping African-American shoppers more frequently than white shoppers were stopped. Accordingly, the Court finds that this affidavit is proper and will be considered by the Court when ruling on the motion for summary judgment.

Therefore, plaintiff's Motions for Leave to Supplement His Exhibit Attachments to his Suggestions in Opposition to the Motion for Summary Judgment (Docs. # 67 and # 135) are hereby GRANTED in part and DENIED in part. As discussed above, the Court finds Exhibits C, D and F are unauthenticated and therefore will not consider these exhibits when ruling on Defendant 's Motion for Summary Judgment.

B. Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment

Plaintiff has moved to strike defendant's motion for summary judgment because the argument section of defendant's reply suggestions exceeds the ten page limit established by Local Rule 7.1 and because defendant failed to seek leave of court before exceeding the page limit.

In response, defendant states that the argument portion of its reply suggestions is only 10 pages long and it is "Defendant's experience that this is the manner in which this provision is commonly applied in the U.S. District Court for the Western. District of Missouri." Defendant states that the additional pages are necessary in order to respond to the factual sections of plaintiff's suggestions in opposition.

In reply, plaintiff argues that defendant's counsel attempts to deceive the Court by representing that it has been defense counsel's experience that the presentation of facts does not count against the ten page limit for reply suggestions. In support of this, plaintiff's counsel attaches a motion from another case in which defense counsel specifically asked for leave to exceed the 10 page limit. Plaintiff also argues that

defense counsel misstates Local Rule 7.1 and 56.1

Local Rule 7.1(f) states that "Reply suggestions shall be limited to 10 double-spaced pages, unless otherwise authorized by the Court." The rule makes no specific reference to whether this limit includes or excludes a response to facts presented in opposition to a motion for summary judgment. Although the Court believes that the better practice would have been for the defendant to seek leave to exceed the ten page limit, the Court does not find this a sufficient basis on which to strike defendant's summary judgment motion. Accordingly, plaintiff's motion to strike defendant's motion for summary judgment (Doc. # 69) is hereby DENIED.

C. Standard for Summary Judgment

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the moving party meets this requirement, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. 242, 248 (1986). In Matsushita Electric Industrial Co.Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), the Court emphasized that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts" in order to establish a genuine issue of fact sufficient to warrant trial. "Instead, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it." Kinnaman v. Ford Motor Co., 79 F.Supp.2d 1096, 1098 (E.D.Mo. 2000),

citing, Anderson, 477 U.S. 242, 249 and Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. Matsushita, 475 U.S. 574, 588; Tyler v. Harper, 744 F.2d 653, 655 (8th Cir. 1984), cert. denied, 470 U.S. 1057 (1985).

D. COUNT I - 42 U.S.C. § 1981.

Plaintiff alleges in Count I that he was detained without a factual basis for an unreasonable length of time and in an unreasonable manner. During this time, plaintiff alleges that he was subjected to racial slurs, harassed, and wrongfully and maliciously prosecuted because of his race. Plaintiff alleged that defendant engaged in a pattern, practice, policy or custom of searching, arresting, detaining, or prosecuting African-American shoppers at a significantly greater rate than it searches, detains, arrests or prosecutes white shoppers. As a result, plaintiff alleges that he was deprived of the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens in violation of 42 U.S.C. §1981." (Plaintiff's Petition, ¶ ¶ 50-52). Plaintiff further alleges that he was denied "rights to make, perform, modify, and terminate the contract of sale, and/or denied...the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship, because of [his] race." (Plaintiff's Petition, ¶ 53). Finally, plaintiff claims that defendant deprived him "of his full and equal right to make and enforce contracts as is enjoyed by white citizens, in violation of 42 U.S.C. § 1981." (Plaintiff's Petition, ¶ 54).

Section 1981 addresses racial discrimination in contractual relationships. As amended by the Civil Rights Act of 1991, the statute provides:

(a) All persons within the jurisdiction of the

> United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) For purposes of this section, the term 'make and enforce contracts includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.
>
> 42 U.S.C. § 1981 (a)-(c).

One court has noted that § 1981 establishes four protected interests: "(1) the right to make and enforce contracts; (2) the right to sue, be parties, and give evidence; (3) the right to the full and equal benefit of the laws; and (4) the right to be subjected to like pains and punishments." Wesley v. Don Stein Buick, Inc., 42 F.Supp.2d 1192, 1199-1200 (D.Kan. 1999).

To establish a claim for violation of § 1981, plaintiff must establish: (1) that he is a member of a racial minority; (2) that defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute. Morris v. Office Max, Inc., 89 F.3d 411, 413 (7th Cir. 1996); Hampton v. Dillard Dept. Stores, Inc., 985 F.Supp. 1055, 1059 (D.Kan. 1997); Sterling v. Kazmierczak, 983 F.Supp. 1186, 1191 (N.D. Ill. 1997); Lewis

v. J.C. Penny Co. Inc., 948 F.Supp. 367, 371 (D.Del. 1996). Section 1981 claims are analyzed under the burden-shifting model outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Thus, if plaintiff establishes a prima facie case, the burden shifts to defendant to articulate a "legitimate, nondiscriminatory" reason for its actions. Plaintiff then must come forward with evidence to establish that defendant's proffered reasons are a mere pretext for the discriminatory conduct. Lewis, 948 F.Supp. at 371; Hampton, 985 F.Supp. at 1059.

One court has noted that:

> Litigation involving § 1981 claims most commonly involves the right to make and enforce contracts of employment...Claims involving retail transactions have been infrequent. Patrons have, however, brought suits under § 1981 for refusal of service...for removal from the store...and for a store practice of recording the race of all customers paying by check.

Morris, 89 F.3d at 413.[6]

1. Racial Minority Status

There is no dispute that plaintiff is a racial minority. Thus, plaintiff has satisfied the first prong of the prima facie test.

2. Intent to Discriminate

The second prong of the test requires that plaintiff demonstrate that defendant had an intent to discriminate. "'Section 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination.'" Allen v. Montgomery Ward & Co. Inc., No. Civ. 1:98CV7, 1999 WL

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[6]The Court was unable to locate any Eighth Circuit case law discussing a §1981 claim in a retail context. Thus, the Court has relied on cases from other jurisdictions which have examined this issue.

33117435, (W.D.N.C., Mar. 3, 1999), aff'd, 198 F.3d 236 (4 th Cir. 1999), citing, General Bldg. Contractors Assn. Inc. v. Pennsylvania, et al., 458 U.S. 375, 391 (1982). Plaintiff alleges that this intent is demonstrated by Hy-Vee's discriminatory pattern and practice of targeting, stopping and prosecuting African-Americans, Hy-Vee's discriminatory actions against its black employees, Hy-Vee's malicious actions in not allowing plaintiff to use the phone and insisting that the police arrest plaintiff and take him to jail without any probable cause and derogatory remarks are sufficient to demonstrate that Hy-Vee had an intent to discriminate against plaintiff on the basis of his race.

In support of his assertion that Hy-Vee had a discriminatory pattern and practice of targeting, stopping and prosecuting African-Americans, plaintiff relies in part on a statement from Marsha Cumberland. Ms. Cumberland, who worked for Hy-Vee for a year as an aisle director, stated that African American shoppers were followed and watched closely. She also stated that African American customers were stopped more than white customers and when they were stopped they were accused of shoplifting.[7]

Plaintiff alleges that Hy-Vee can point to no instance where it detained, arrested and jailed any white person without probable cause. Plaintiff claims that Hy-Vee's records show that it does not impartially stop and prosecute both black and white suspects. Plaintiff states that Hy-Vee's records show that of all the people it claims were caught shoplifting, Hy-Vee did not call the police on twenty of these suspects. Of the twenty receiving this leniency, plaintiff states that only one was African-American. However, plaintiff fails to consider that of

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[7] Plaintiff also relies on the affidavit of Susan Thomas, however the Court only considers those portions of the affidavit in which the witness relates events which she personally observed.

the total number of incident reports produced,[8] the number of African Americans stopped is low. Hy-Vee's summary indicates that only four African Americans were stopped, plaintiff's summary lists only three. Thus, when considered in connection with the total number of African Americans stopped, the fact that Hy-Vee did not call the police for one African American shoplifter is not disproportionate.

Plaintiff also asserts that Hy-Vee's actions in not allowing plaintiff to make a phone call and insisting that the police arrest and take plaintiff to jail without any probable cause establish that Hy-Vee had an intent to discriminate against plaintiff.

"A lack of probable cause may only be relevant if it helps to establish the requisite racial animus." Allen at * 2. "'Probable cause' exists when 'facts and circumstances known to the officer [or in this case, the Defendant] warrant a prudent man in believing that the offense has been committed.'" Allen at *3, quoting, Henry v. United States, 361 U.S. 98, 102 (1959). In the instant case, the Court finds that there was probable cause to believe that plaintiff had committed the offense. While in the meat department, McVey observed plaintiff standing in front of the aisle containing the beef jerky. McVey believed plaintiff was acting suspiciously and continued to observe him. McVey observed plaintiff with his hands under his shirt and then saw plaintiff walk partway down the aisle toward the cash registers. McVey continued watching as plaintiff then turned around and returned to the beef jerky

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[8]There appears to be a discrepancy in the number of incident reports, plaintiff lists 64 names in the "Summary of Hy-Vee Incident Reports Produced." However, in counting the number of reports contained in Exhibit G, there were only 49 such reports. Hy-Vee in its Summary, Exhibit 1 to the Motion for Summary Judgment, lists 53 such stops. Regardless of the total number of persons stopped, the number of African Americans shoppers who were stopped in each of these summaries is only 3 or 4 individuals.

section and placed one cannister of beef jerky back on the shelf and selected another. At this point, it was McVey's belief that plaintiff put the second canister underneath his shirt. As plaintiff was walking toward the cash registers, McVey went to the beef
jerky section and picked up the cannister of jerky that plaintiff had returned to the shelf. He opened it and discovered that it had no foil seal and only two or three pieces of jerky in the cannister. After stopping plaintiff, McVey examined plaintiff's cannister of beef jerky and saw that it was without its foil seal and appeared to be "crammed full" of beef jerky. Based on this evidence, the Court finds that McVey had probable cause to stop plaintiff.

As to not allowing plaintiff to make a phone call and insisting upon arrest, the Court does not find that these actions by themselves constitute evidence of racial animus. Plaintiff has not indicated that there was a company policy that suspected shoplifters were allowed to use the phone. The Court also does not find anything indicative of racial animus in insisting that plaintiff be arrested, when it is Hy-Vee's policy to call the police on all suspected shoplifters except the very old or the very young.

The derogatory remarks made by Hy-Vee's employees are more troubling. Plaintiff alleges that there were two derogatory remarks made to him by defendant's employees. The first remark allegedly occurred when plaintiff asked for his money or his merchandise back and one of Hy-Vee managers responded: "You and your people have to pay back double the amount." Also when the police officer arrived and asked who was the accused, one of Hy-Vee's managers allegedly responded: "This boy here." Hy-Vee asserts that even if the statements were made they were too vague and ambiguous to establish discriminatory intent. In support of assertion, Hy-Vee relies on Murray v. Pizza Hut Inc., No. 96-7032, 1996 WL

425646 *3(10th Cir. July 30,1996), where the Court found that manager's racial slurs: "Listen, I don't have to serve you, nigger, if I don't want to" and "Bring your black ass outside, and I'm going to show you some manners" were "reprehensible, but are not actionable, per se, under § 1981, nor do they, in this instance, show that racial animus prevented [plaintiff] from making a contract." Hy-Vee also cites Stewart v. Harrah's Illinois Corp., No. 98 C 5550, 2000 WL 988193, (N.D. Ill. July 18, 2000) where the Court found the statement "nigger, I don't want to put my hands on you," by an off-duty officer before searching plaintiff was offensive, but was "insufficient to show that race motivated [plaintiff's] arrest or the charges brought against him." Id. at * 17. The Court found that there was probable cause to arrest plaintiff and a single unrelated remark did not establish that racial animus was the motivating factor.

However, there are other cases which indicate that even one statement can support an inference of discrimination. In Alexis v. McDonalds' Restaurants of Mass., 67 F.3d 341, 348 (1st Cir. 1995), an off-duty police officer at the restaurant said to plaintiff during the arrest "You people have no rights. You better shut up your . . . mouth before I arrest you too." The defendant argued that this statement was too general to support a 1981(a) claim. However, the Court in that case disagreed stating:

> A rational fact finder who credited this statement, as we must at summary judgment, ...reasonably could infer that [the police officer] harbored a racial animus adequate to support a section 1981 claim, especially since the record reflects that the only relevant behavior or physical characteristic – both apparent to [the officer] and shared by the [plaintiff's family] – was their black skin.

Id. at 348. Similarly, in Gatlin v. Jewel Food Stores, 699 F.Supp. 1266 (N.D. Ill. 1988), plaintiff, a black employee of defendant's grocery store was accused of eating food without paying for it. During a meeting to discuss the incident, the store's security supervisor said: "Look, I'm tired of this shit. I know you took the cheese because you people always do something like that. All you have to do is just sign this piece of paper, apologize and that is it." The Court found that this statement raised an inference of discrimination. "It is a permissible (though not the only possible) inference from that statement that Rames–the Jewel employee responsible for investigating alleged theft–believed blacks ("you people") always steal food. That would provide direct evidence of discriminatory intent." Id. at 1268.

Hy-Vee claims that even if the statement was made, the statement "you people" could have been meant to refer to shoplifters. However, as the Court noted in Gatlin, while this is one possible inference, it is not the only possible inference. The Court also finds that this statement could have meant the plaintiff as a black customer had to pay double. As to the statement, "this boy here" the Court does not find that statement evidences racial animus, particularly in light of plaintiff's young
age. Were the statement the only evidence presented of discriminatory intent, the Court might be less inclined to find that plaintiff had established this element of his prima facie case, but when combined with the other evidence, the Court finds that plaintiff has established the second element- that Hy-Vee had the requisite intent to discriminate against him.

3. Activities Covered by the Statute

The third element of the prima facie case which plaintiff must establish is that the alleged discrimination concerned one or more of the activities enumerated in the statute. As noted above, § 1981 has been held to establish four protected

interests: "(1) the right to make and enforce contracts; (2) the right to sue, be parties, and give evidence; (3) the right to the full and equal benefit of the laws; and (4) the right to be subjected to like pains and punishments." Wesley, 42 F.Supp.2d 1192, 1199-1200.25 (D.Kan. 1999); Lewis, 948 F.Supp. 367, 371 (D.Del. 1996). It would appear that only the first and third interests are implicated in the instant case.

a. Right to Make and Enforce a Contract.

Plaintiff claims that it is undisputed that plaintiff paid for a canister of beef jerky and was stopped just after leaving the register. Hy-Vee employees then took the beef jerky away from plaintiff and did not return it or refund his money. Hy-Vee then had plaintiff detained, called the police, pressed charges and had plaintiff arrested. Plaintiff claims that these actions interfered with 'the enjoyment of all benefits, privileges, terms and conditions' of the 'contractual relationship' he made with Hy-Vee at the point of purchase. (Plaintiff's Suggestions in Opposition, p. 26). Plaintiff relies on Hampton v. Dillard Department Stores, Inc., 985 F.Supp. 1055 (D.Kan. 1997), and states that the Court in that case held that summary judgment could not be granted for the defendant because the plaintiff was denied the benefit of her purchase, after the point of purchase. In that case plaintiffs were shopping in one of defendant's stores in the children's department. One of Dillard's security officers observed one of the plaintiffs holding a rolled up dark cloth item. Another Dillard's employee watched plaintiffs in the fitting room and saw one of the plaintiffs push a rolled up cloth item into her jacket. She reported this to the security officer. When they left the fitting room, the plaintiffs purchased an outfit at one of the cash registers. The clerk then gave plaintiffs coupons for men's cologne samples, redeemable at the men's fragrance counter. Plaintiffs proceeded to the fragrance and cosmetics counter to obtain their samples. The security officer interrupted plaintiffs while they were redeeming their

samples. He informed them that one of the plaintiffs had been observed putting something blue under her coat. The security officer then asked to see plaintiffs' bag. He compared the receipt to the merchandise and found that they matched. One of the plaintiffs was upset and raised her voice. The security officer told one of the plaintiffs to calm down or he would call the police and have them removed. After this incident, plaintiffs did not attempt to redeem their fragrance coupons. Plaintiffs in that case claimed that the officer's actions 1) deprived them of their right to make, perform, modify and terminate a contract and 2) violated their right to enjoy all benefits, privileges, terms and conditions of their contractual relationship. However, the Court noted that the plaintiff identified no contract with which the security officer interfered. Because of this, the Court granted summary judgment with regard to that allegation. As to the argument that "freedom from racially discriminatory security practices is a benefit or privilege of a merchant's implied contractual offer to let them shop in its store" the Court noted that plaintiffs cited no legal precedent for this argument, and this theory had been rejected by at least one other court. Id. at 1059-60, citing, Lewis v. J.C. Penney, 948 F.Supp. at 371-72. Thus, the Court in Hampton found that "plaintiffs have failed to establish the third element of their prima facie case - that defendant infringed rights secured by Section 1981 when it interfered with the benefits and privileges of such a contract between Dillard's and its customers." Id., 985 F.Supp. at 1060. However, the Court noted that its holding did not completely resolve the issue because plaintiffs had alleged in a Pretrial Order that the security officer interrupted them while they were redeeming their free cologne samples, and that he therefore violated their rights to enjoy the benefits and privileges of their contract with Dillard's. The Court found that summary judgment on this one issue was inappropriate because defendant had not had an opportunity to

address this issue in its motion for summary judgment, as the summary judgment motion was filed before the Pretrial Order was finalized. Id. at 1060. Thus, contrary to plaintiff's argument, the only reason the Court in Hampton declined to grant summary judgment was because plaintiffs had not completed the redemption of their cologne samples and were in the middle of finalizing this "contract." Id.

In the instant case, plaintiff had completed his contract when he purchased the canister of beef jerky. Similarly, in Lewis, 948 F.Supp. at 372, where the plaintiff had done her shopping and was leaving the store, the Court found that no contractual relationship remained. See also, Flowers v. TJX Cos. Inc., No. 91-CV-1339, 1994 WL 382515, at * 6 (N.D.N.Y. July 15, 1994)(where plaintiffs had completed their retail transactions there was no interference with the formation of a contract and summary judgment was granted). Thus, because plaintiff was not prevented from.28
purchasing the beef jerky, and was only stopped after completing his purchase, the Court finds that plaintiff cannot establish that he was denied the right to make and enforce a contract.

b. Full and Equal Benefit of All Laws and Proceedings for the Security of Persons and Property.

Plaintiff alleges that courts have held that the "equal benefits" and "like punishments" language extends to include racially motivated arrests and searches made in the absence of probable cause. Plaintiff's Suggestions in Opposition, p. 28, citing, Mahone v. Waddle, 564 F.2d 1018, 1028 (3d Cir. 1977), cert. denied, sub. nom., City of Pittsburgh v. Mahone, 438 U.S. 904 (1978); Mendez v. Rutherford, 687 F.Supp. 412, 416 (N.D.Ill. 1988). Plaintiff states that the Supreme Court has "opened the door for § 1981 actions relating to interference with non-contractual constitutional rights, such as the right to liberty and due process" and that 1981 specifically states that

'The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State of law.'" (Plaintiff's Suggestions in Opposition, p. 28.)

However, the Court finds that plaintiff has misunderstood these opinions. In Mahone v. Waddle, 564 F.2d 1018, 1029 the Court stated:

> The words "full and equal benefit of all laws and proceedings for the security of persons and property" on the other hand, suggest a concern with relations between the individual and the state, not between two individuals. The state, not the individual, is the sole source of law, and it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law. Thus, while private discrimination may be implicated by the contract clause of section 1981, the concept of state action is implicit in the equal benefit clause.

Similarly, in Sheppard v. Dickstein, Shapiro, Morin & Oshinsky, 59 F.Supp.2d 27, 30 (D.D.C. 1999), n. 1, the Court did not specifically rule on the issue, but noted "[m]ost courts have held that 'the equal benefits' clause does not extend to private discrimination, and thus, requires state action. See, Provisional Government of Republic of New Afrika v. American Broadcasting Companies, Inc., 609 F.Supp. 104, 109 (D.D.C. 1985); Mahone v. Waddle, 564 F.2d 1018 (3d Cir. 1977); Spencer v.Casavilla, 839 F.Supp. 1014, 1018 (S.D.N.Y. 1993). The Supreme Court has not ruled specifically on this issue." Also, in Lewis, 948 F.Supp. at 371, the Court observed that the Third Circuit in Mahone held that "private defendants, as opposed to state actors, cannot deprive individuals of the full and equal benefit of all laws."

The other case cited by plaintiff, Mendez, 687 F.Supp. 412 (N.D.Ill. 1988), involved claims against the City of Chicago arising out of the plaintiff's arrest by members of the Chicago police department and did not address whether private defendants could deprive individuals of the full and equal benefit of all laws. So, while courts have recognized that the equal benefits clause extends to racially motivated arrests and searches, there must be some involvement of state actors. Because Hy-Vee in this case is not a state actor, plaintiff cannot rely on the "full and equal benefits" clause of the statute to support his claim. As discussed earlier, because plaintiff was not prevented from making or enforcing a contractual right this clause also does not apply to plaintiff. The Court finds that plaintiff has failed to establish the third element of his prima facie case–that the alleged discrimination in this case implicated any of the activities enumerated in the statute. Therefore, the Court hereby GRANTS defendant's motion for summary judgment on Count I.

E. COUNT II - § 1983

In Count II of his Petition, plaintiff alleges that Hy-Vee, "acting through its employees and agents, and ratified by its management, was a willful participant in the arrest and prosecution of Plaintiff, a joint action with the State or its agents." (Plaintiff's Petition, ¶ 61).

> In order to recover under section 1983, a plaintiff must prove that the defendant deprived him of a constitutional right under color of state law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). ... a section 1983 action against a private party, a plaintiff will be entitled to relief if he can prove that the private party was 'a willful participant in joint activity with the State or its agents' which activity deprived the plaintiff of a constitutional right.

> Id. at 152. For example, a store and its employees may be considered to be acting jointly with police when the police will detain accused shoplifters without making an independent investigation, Smith v. Brookshire Bros., Inc., 519 F.2d 93, 94 (5 th Cir. 1975)(per curiam), cert. denied, 424 U.S. 915 (1976), or pursuant to a customary plan between the store and the police department, Duriso v. K-Mart No. 4195, Division of S.S. Kresge Co., 559 F.2d 1274, 1277-78 (5 th Cir. 1977)(per curiam).

Murray v. Wal-Mart, Inc., 874 F.2d 555, 558-59 (8 th Cir. 1989).

Plaintiff relies on the Murray case in arguing that Hy-Vee called the police and that the officer who responded to the call relied solely on the statement of a Hy-Vee employee and did not make an independent investigation into the facts of the case. Plaintiff also alleges that the Affidavit of the arresting officer contradicts the deposition testimony the officer gave to plaintiff's counsel and the officer's own report, thus creating a genuine issue of fact.

In Murray, the court found that numerous factors demonstrated that Wal-Mart was acting in concert with the local police. The plaintiff in that case was a black female customer who while shopping was observed by a loss prevention employee taking a bottle of cologne out of its box and placing the bottle inside her halter top. As plaintiff was leaving the store, the loss prevention employee, the store manager and an assistant manger stopped plaintiff and asked about the cologne.

Plaintiff pulled her top down to show that she was not concealing any merchandise. Plaintiff was then escorted upstairs where the contents of her purse were emptied onto the

floor. The Wal-Mart employees then phoned the police and based on the advice of a prosecutor, requested prosecution. Plaintiff was taken into custody and searched, but no items were found.

The Eighth Circuit noted that the store manager stated that it was Wal-Mart's practice to work with the police department in prosecuting shoplifters. The store security guard who stopped plaintiff was also a member of the police department and had a close relationship with the prosecuting attorney, who made the recommendation to prosecute based on the officer's word and not upon an independent investigation. The Eighth Circuit also noted that there was an Arkansas statute which provided that a merchant or his employee may detain a suspected shoplifter to recover unpurchased goods for a reasonable time and in a reasonable manner. This statute, combined with "the concerted actions of Wal-Mart and the local police department, afford ample evidence of willful, joint activity which supports a claim against Wal-Mart under section 1983." Id. at 559.

In Jones v. Wal-Mart Stores, Inc., 33 F.3d 62, 1994 WL 387887(10th Cir. 1994), the Court noted that "[g]enerally, merchants are not considered to be acting under color of law for purposes of 1983 when they detain a person suspected of shoplifting or other crimes, call the police, or make a citizen's arrest." Id. at *3 (citations omitted). In Jones, the plaintiff was leaving the store when she was approached by a loss prevention employee and accused of shoplifting. Jones accompanied the employee to the security office where her purse was searched. Wal-Mart then called the police. When the officer arrived, he spoke to the store employees and provided a citizen's arrest form which the employee filled out and took plaintiff to jail on a charge of petty larceny. The charges against plaintiff were ultimately dismissed. The Court found that this case was distinguishable from Murray because the officer did not make

an arrest, rather a private citizen made the arrest before the officer arrived. Additionally, the Court noted that the officer questioned store employees regarding the incident and that one of the employees swore out a complaint placing plaintiff under arrest for petty larceny. The Court stated that plaintiff's argument that the officer had a duty to conduct an independent investigation, which included interviewing her "confuses his function with that of the
prosecutor or judge and is implicitly rejected in Lee v. Town of Estes Park, 820 F.2d 1112, 1114-15 (10th Cir. 1987)(noting procedure whereby officer took custody of the suspect and determined charges based solely on interview with the accuser who had made the citizen's arrest)." Id. at *4.

The facts in the instant case also differ from those in the Murray case and demonstrate that Hy-Vee was not acting in joint action with the police officer and thus cannot be liable under 42 U.S.C. § 1983. In the instant case, plaintiff argues that joint action is shown because the officer did not make an independent investigation of the facts of the case, but instead relied solely on the statement of Hy-Vee's employee, Sheldon McVeigh. Plaintiff also alleges that there are inconsistencies in the officer's statements. In his police report Officer Price stated the following:

> On 4/13/1998 at 1757 hrs I was dispatched to 8301 N. St. Clair (HyVee) on a reported shoplifter. Upon arrival I made contact with the witness: McVey, Sheldon J. w/m (employee of the victim) who stated the following: on 4/13/1998 at 1745 hrs he observed the listed suspect pick up two canisters of beef jerky then open both and place the contents of both canisters into one canister (Listed #1 Item). The suspect then went to the check out line only paying for one canister. The witness then

> detained the suspect until my arrival. My investigation revealed the above statement. The suspect was then arrested for the stealing. Transported to the North Patrol Station (By the Reporting Officer) and booked on GOS # 1G122524 for 50-106 with a court date of 7-2-98, 1100 hrs in Rm # H. The #1 item was recovered and released to the witness.

(Exhibit N, Appendix to Defendant's Motion for Summary Judgment, Vol. II).

In his Affidavit Officer Price stated: "[a]fter conducting an independent investigation, I determined I had probable cause to arrest Carl Youngblood for shoplifting. I would not have arrested Carl Youngblood if I had not made my own independent determination that probable cause existed. I did not arrest Carl Youngblood pursuant to any pre-arranged or customary plan with Hy-Vee." (Affidavit of Officer Lonnie Price, Exhibit F, Appendix to Defendant's Motion for Summary Judgment, Vol. I).

Plaintiff's counsel also took a statement from Officer Price, in deposition form in which Officer Price stated as follows:

> Q. When I say 'may have been,' I don't want you to speculate. I want you to tell me what you do recall.
>
> A. Okay. The only conversation I recall is asking the witness here what happened and him telling me about placing the two items into a one cannister and asking them if they wanted to press charges. What we call sign a complaint, general order and summons, that's the only conversation I remember.

(Price Deposition Statement, p. 14, l. 7-16, Exhibit U to Plaintiff's Suggestions in Opposition).

> Q. And did you review any evidence prior to

making an arrest of Mr. Youngblood?
A. Yeah, they had the canisters of beef jerky still there.
Q. And can you describe what you saw?
A. I remember-I believe it was a red canister just a - you can't put yah-high.
Q. About how tall?
A. Approximately 6, 7 inches tall with a plastic top on it.
Q. Okay. Did you seize anything else?
A. No.
Q. Did you look inside the canister itself?
A. I believe I did, yeah, I did.
Q. Okay. What do you recall?
A. It was–I can't remember if the beef jerky was wrapped in plastic inside or opened but there was beef jerky inside.
Q. Okay. Anything in particular that you recall about the beef jerky inside the canister?
A. No.
Q. Did you count them?
A. I don't believe I did, no.
Q. Okay. Didn't weigh them?
A. No.
Q. Did you retain any evidence in that arrest?
A. No, it was released back to the store.
Q. To the store?
A. Yes.
Q. Okay. Why is that?
A. That's normally what we do with stealings, release the, whatever the item is back to the store.

(Price Deposition Statement, pp. 19 - 20).

Q. Okay. And you based your report on the

statements of Mr. McVeigh,[sic]
correct?
A. Correct.
Q. And you didn't do a, any other investigation other than what Mr. McVeigh
said?
A. Correct.
Q. Okay. Did you ask Mr. Youngblood what had happened?
A. Not once I had – no, because I got the information from Mr. McVeigh, I
determined it was enough probable cause to make an arrest and by the time I arrested him, questioning him after he was placed under arrest.

(Price Deposition Statement, p. 21, l. 14-25; p. 22, l. 1).

In the instant case, the Court does not find that the police report, the affidavit or the deposition statement contradict each other, rather they indicate that after Officer Price was called to the scene he spoke with McVey and examined the contents of the beef jerky canister. While there is no indication that Officer Price spoke with the plaintiff, as noted in Jones, this is not required. Additionally, the Court notes that unlike in Murray, plaintiff was observed by an employee of the store and not by an off-duty police officer.

One additional point needs to be addressed. In Murray, the Eighth Circuit stated that the concerted action of the store combined with an Arkansas statute authorizing merchants to detain suspected shoplifters was evidence of the willful, joint activity. Missouri has a similar statute which authorizes detention of suspected shoplifters. Mo.Rev.Stat. 537.125[9]. It is

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[9]The statute specifically states in part:
2. Any merchant, his agent or employee, who has reasonable grounds or

not clear under Murray whether a merchant's actions under this statute alone would constitute sufficient state action. However, the Court notes that other courts have found that where this is the only evidence of joint action, it is not sufficient. See, Lewis, 948 F.Supp. at 373, citing, Vassallo v. Clover, 767 F.Supp. 651 (E.D.Pa. 1990); Gipson v. Supermarkets Gen.,37 Corp., 564 F.Supp. 50, 53 (D.N.J. 1983).

> These courts rely on the basic premise of Cruz v. Donnelly, 727 F.2d 79 (3d Cir. 1984) that state action will not be found in the absence of a substitution of the private actor's judgment for that of the police. Delaware's statute does not authorize a substitution of judgment; it merely permits stores to temporarily detain suspected shoplifters until the police can take charge at the scene. Therefore, defendants are not state actors and summary judgment will be granted for them with respect to plaintiff's section 1983 claims.

Lewis, 948 F.Supp. at 373. However, in Sanders v. Sears Roebuck & Co., 984 F.2d 972 (8 th Cir. 1993), the Eighth Circuit stated "we assume without deciding that [Sears] 'acted under color of state law'" by virtue of a North Dakota statute which authorized merchants to detain suspected shoplifters. Id. at 975. In the instant case, the Court finds that without evidence of any other action on the part of Hy-Vee, Hy-Vee's reliance on

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probable cause to believe that a person has committed or is committing a wrongful taking or merchandise or money from a mercantile establishment, may detain such person in a reasonable manner and for a reasonable length of time for the purpose of investigating whether there has been a wrongful taking of such merchandise or money. Any such reasonable detention shall not constitute an unlawful arrest or detention, nor shall it render the merchant, his agent or employee, criminally or civilly liable to the person so detained.

this statute alone does not transform it into a "state actor" for the
purposes of Section 1983 liability. Accordingly, defendant's motion for summary judgment on Count II is hereby GRANTED.

F. COUNT III - MALICIOUS PROSECUTION

In order to establish a claim for Malicious Prosecution under Missouri law, plaintiff must prove six elements: "(1) the commencement of a prosecution against the plaintiff; (2) instigation by the defendant; (3) termination of the proceeding in favor of the plaintiff; (4) the want of probable cause for the prosecution; (5) [that] the defendant's conduct was actuated by malice[;] and (6) that the plaintiff was damaged." Cassady v. Dillard Department Stores, 167 F.3d 1215, 1219 (8 th Cir..38 1999), citing, Bramon v. U-Haul, Inc., 945 S.W.2d 676, 684 (Mo.App. 1997).

"All six of these elements must be proved, and a plaintiff's failure to prove any one of these elements results in a failure to make a submissible case of malicious prosecution... Furthermore, a defending party in such a case may establish a right to summary judgment by showing facts that negate any one of the claimant's elements." Thompson v. Wal-Mart, 890 S.W.2d 780, 782 (Mo.App.1995)(citations omitted). Probable cause to initiate criminal proceedings is defined as: "'reasonable grounds for suspicion, supported by circumstances in evidence sufficiently strong to warrant a cautious man in his belief that the person accused is guilty of the offense charged.'" Id. quoting, Alexander v. Laclede Gas Co., 725 S.W.2d 129, 130 (Mo.App. 1987). In Thompson the Court noted that MAI (4 th) 16.06 [1980 New] defines "reasonable grounds" in malicious prosecution instructions as "'that under the circumstances an ordinarily careful and prudent person after having made a reasonable inquiry would have believed the facts alleged and that the judicial proceeding was valid.'" Id.

"Where the facts pertaining to the issue are not in dispute, the determination of whether there was probable cause is a question of law for the court, and not a question of fact for the jury." Id., citing, Alexander, 725 S.W.2d at 130.

In the instant case, there is no dispute as to the first three elements. However, there is a dispute as to whether probable cause existed for the prosecution and whether Hy-Vee's conduct was actuated by malice. However, the court will consider only the question of probable cause, because the Court finds that plaintiff has failed to establish this element of the prima facie case.

There is no dispute that while McVey was in the meat department, he observed plaintiff standing in front of the aisle containing the beef jerky. There is also no dispute that McVey believed that plaintiff was acting suspiciously and continued to observe him. McVey states that he observed plaintiff with his hands under his shirt and then saw plaintiff walk partway down the aisle toward the cash registers. McVey continued watching as plaintiff then turned around and returned to the beef jerky section and placed one cannister of beef jerky back on the shelf and selected another. At this point, it was McVey's belief that plaintiff put the second canister underneath his shirt. As plaintiff was walking toward the cash registers, McVey went to the beef jerky section and picked up the cannister of jerky that plaintiff had returned to the shelf. He opened it and discovered that it had no foil seal and only two or three pieces of jerky in the cannister. After stopping plaintiff, McVey examined plaintiff's cannister of beef jerky and saw that it was without its foil seal and appeared to be "crammed full" of beef jerky.

Plaintiff attempts to create an issue of fact by relying on his own assertions that he did not put canisters or packages of beef jerky under his shirt. Plaintiff's assertions as to his own innocence however are insufficient to refute what McVey believed he saw. Plaintiff also attempts to create an issue of fact

by arguing that McVey could not have observed plaintiff the whole time, because the exit to the meat department was located two aisles down from the beef jerky aisle and also by arguing that McVey is nearsighted and does not recall whether he was wearing his glasses on the day in question. Plaintiff also argues that the Hy-Vee employees did not open the canister in his presence.

With regard to the store diagram, as discussed above, this exhibit will not be considered in ruling on the motion for summary judgment as it was not properly authenticated. As to McVey's eyesight, in his deposition McVey stated only that he is required to wear glasses at night to drive. There is no indication that he cannot see without his glasses during the day or that he was not wearing them on the day in question. As to the issue of whether the canister was opened in plaintiff's presence, plaintiff relies on his affidavit to support this statement, but in his deposition, plaintiff stated "I don't know if he took it out or not. I don't remember if he took it out or not." (Plaintiff's Depo., Exhibit K to Plaintiff's Suggestions in Opposition, p. 82, l. 11. 8-9). Plaintiff cannot create an issue of fact by using an affidavit to contradict his earlier deposition testimony. Camfield Tires Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1365 (8 th Cir. 1983). The Court finds that plaintiff has failed to create an issue of fact as to what McVey observed. Based upon these facts, the Court further finds that McVey had "reasonable grounds for suspicion, supported by circumstances in evidence sufficiently strong to warrant a cautious man in his belief that the person accused is guilty of the offense charged." Thompson, 890 S.W.2d at 782. Accordingly, because plaintiff has failed to show that there was a lack of probable cause, plaintiff has failed to establish a prima facie case of malicious prosecution and defendant's motion for summary judgment on Count III is hereby GRANTED.

G. COUNT IV - FALSE IMPRISONMENT

> A false arrest or false imprisonment occurs when there is confinement without legal justification by the wrongdoer of the person wronged...The constituent elements of false imprisonment are the restraint of the plaintiffs against their will, and the unlawfulness of the restraint...Defendants are liable if it is shown that they instigated, caused or procured the arrest...Showing that defendants merely gave information to the police is insufficient, even if that information is wrong...However, if the plaintiffs allege that the defendants knowingly provided false, incomplete or misleading information, and an illegal arrest results, it may be reasonably inferred that they instigated the illegal arrest.

Bramon v. U-Haul, Inc., 945 S.W.2d 676, 680 (Mo.App. 1997).

Hy-Vee claims that the detention of plaintiff was not unlawful and that a Missouri statute gives store owners a right to detain individuals for a reasonable period of time to conduct a reasonable investigation. Plaintiff argues in response that Hy-Vee cannot show that it acted reasonably because Carl was not free to leave, Hy-Vee did not conduct any investigation while detaining him and fabricated the reason for detaining him.

As noted above, Mo.Rev.Stat. § 537.125 provides:

> 2. Any merchant, his agent or employee, who has reasonable grounds or probable cause to believe that a person has committed or is committing a wrongful taking of merchandise or money from a mercantile establishment, may detain such person in a reasonable manner and for a reasonable length of time for the purpose of investigating whether there has been a

> wrongful taking of such merchandise or money. Any such reasonable detention shall not constitute an unlawful arrest or detention, nor shall it render the merchant, his agent or employee, criminally or civilly liable to the person so detained.

In Redican v. K Mart Corp., 734 S.W.2d 864, 868 (Mo.App. 1987), the court held that where "the material facts are in dispute, with one version of the facts establishing reasonable grounds and another version refuting it, then it is up to the jury to determine which set of facts existed." Id. at 868, citing, Linkogel v. Baker Protective Services, Inc., 659 S.W.2d 300, 304 (Mo.App. 1983). In the instant case however, as the Court discussed above, there is no genuine dispute as to whether McVey had reasonable grounds to stop plaintiff. Additionally, the facts establish that the detention was itself reasonable. Plaintiff was allowed to sit in a chair in an office with the door open and Hy-Vee called the police within minutes of stopping plaintiff. Based upon these facts the court finds that Hy-Vee acted in accordance with the Mo.Rev.Stat. § 537.125 and is entitled to summary judgment on Count IV.

H. COUNT V - DEFAMATION

In his Petition, plaintiff alleges that "[b]y openly accusing Plaintiff and searching him in the front of the store, and then detaining Plaintiff and causing his arrest, Defendant Hy-Vee, acting through its agents and employees, communicated to third party bystanders in the Hy-Vee store and others that Plaintiff had committed a criminal act" and "[b]y pressing charges, proceeding to and participating in prosecution, Defendant, acting through its agents and employees, communicated to third parties that Plaintiff had committed a criminal act." (Plaintiff's Petition, ¶¶ 79-80).

"The elements of defamation in Missouri are: 1) publication; 2) of a defamatory statement, 3) that identifies the

plaintiff, 4) that is false, 5) that is published with the requisite degree of fault, and 6) damages the plaintiff's reputation." Overcast v. Billings Mutual Insur. Co., 11 S.W.3d 62, 70 (Mo. banc 2000). In the instant case, Hy-Vee alleges that plaintiff has not pled or even identified any alleged defamatory statement, but is apparently claiming that defendant's actions constituted the defamatory statement. Hy-Vee claims that there is no support for such a claim and summary judgment is therefore appropriate. In response plaintiff argues only that Hy-Vee's allegation that Carl committed a crime is a statement which can be grounds for defamation. However, plaintiff does not enlighten the Court as to specifically what words or statements he is alleging were defamatory.

> Under Missouri law, it is required that in actions of libel and slander, the petition must set forth the words, statements or language for which the plaintiff claims damages. It is not sufficient to generally allege false and allegedly untruthful reports reflecting upon the plaintiff's reputation or integrity. General allegations of circulating false or untruthful reports are insufficient.

Dillard Dept. Stores Inc. v. Muegler, 775 S.W.2d 179, 184 (Mo.App. 1989); Carey v. Pulitzer Pub. Co., 859 S.W.2d 851, 854 (Mo.App. 1993). However, for the purposes of summary judgment, the Court will assume that the statements made to the plaintiff immediately after he was stopped are the statements of which plaintiff is complaining. In his deposition plaintiff testified as follows:

> Q. And when the person in front of you asked you to stop, do you remember exactly what that person said?
>
> A. I don't remember exactly like word for word, but he, just, you know, told me to stop because

the guy to the right of me saw me shoplifting, putting stuff under my shirt and in my pants.

Q. Did he use the words "shoplifting"?

A. He said he saw me putting stuff up in my – up and down and in my shirt.

(Plaintiff's Depo. p. 68, ll. 1-11).

> A statement is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him...Whether a statement is capable of having a defamatory meaning is a question of law for the trial court...The trial court must determine whether the communication reasonably conveyed the meaning ascribed to it by plaintiff and, if so, whether the meaning was defamatory in character.

Deckard v. O'Reily Automotive Inc., No. WD 57385, 2000 WL 1049707 (Mo.App. Aug. 1, 2000)(citations omitted). The Court finds that if a statement was made to plaintiff accusing him of shoplifting that it could potentially be considered a defamatory statement. The next question is whether the statement was published. "One of the essential elements of the tort of libel is publication, which is simply the communication of defamatory matter to a third person." Dean v. Wissmann, 996 S.W.2d 631, 633 (Mo.App. 1999).

In his deposition plaintiff testified as follows:

Q. Were those three individuals the only individuals who were around at that point in time?

A. No. There was employees at the cash register and persons in the store.

Q. Did anyone stop to watch what was happening?

A. A couple of people looked back as they was walking out of the store and people at the cash registers were looking and people purchasing stuff.

Q. But no one actually came up to stop and you didn't have a crowd around you?

A. No.

Q. So as people were leaving the store, they kind of watched to see what was going on; is that right?

A. Yes, ma'am.

Q. And there were some cashiers at the cash registers who maybe watched to see what was going on; is that right?

A. Yes ma'am. And people purchasing stuff at the cash register.

Q. Did you recognize anyone or know anyone who was watching what was happening?

A. The guy that worked at the cash register that I purchased the stuff, I knew him and I knew I would say about two more people that worked there.

Q. Any they were actually present when this was happening?

A. I don't think – well, the one was present, but I don't know if he was watching.

(Plainitff's Deposition, p. 72 - 73).

Based on this testimony, the Court does not find that plaintiff has established that any alleged statements were heard by anyone and therefore plaintiff has failed to establish that the statements were published. However, even assuming that the statements were heard by someone, plaintiff has not shown that he suffered any damage. Plaintiff testified in his deposition:

Q. And it states here that you've had damage to your reputation. In what way has your reputation been damaged?
A. I feel like people look at me different.
Q. How so?
A. They saw me getting arrested with handcuffs on me.
Q. And who saw you getting arrested with handcuffs?
A. Just the people in the store generally.
Q. Do you have any contact with those individuals?
A. No, ma'am.
Q. And have you talked with any of those individuals to know what their opinion is of you?
A. No, ma'am.
Q. Other than the individuals in the store who saw you with the handcuffs, is there anyone else that you feel your reputation has been damaged with?
A. The people that they had as witnesses and stuff and talked to, but I don't feel it's been damaged that much because they know I didn't do it.
Q. I'm not following what you mean.
A. The people, like the names of the people on here.
Q. Oh, the individuals that your attorney identified as witnesses?
A. Yes.
Q. And how do you feel your [reputation] has been damaged with them?
A. I feel that like if – I feel a hundred percent

that they know I didn't do it, but it's always in the back of their mind. If somebody did something, you also have that little–

Q. Do you know if your attorney has actually talked with any of those individuals?

A. No, I don't.

Q. And have any of these individuals indicated to you in any way that they believe that any of this happened or they think less of you?

A. No, ma'am, but my feeling is they all have told me they look at me the same way, but me wise, I feel like it's always that little thought in the back of their mind something they just don't forget.

Q. So with regard to the damage to your reputation, that's something that you feel or are concerned about?

A. Yes, ma'am.

Q. It's not something that someone has expressed to you?

A. No, ma'am.

Q. Is that correct?

A. Yes, ma'am, that's correct.

(Plaintiff's Depo., pp. 146-148). A review of plaintiff's testimony indicates that it is only plaintiff's own subjective belief that he has been damaged by the alleged statements, and no one has expressed their opinion to him that they think less of him because of any statement made by defendant or has refused to deal with plaintiff because of such statements. Therefore, the Court finds that plaintiff has not established that he suffered any damages as a result of any statement made by Hy-Vee.

Accordingly, the Court finds that defendant is entitled to summary judgment on Count V.

III. CONCLUSION

For all the reasons cited above the Court finds that defendant is entitled to summary judgment on all claims of plaintiff's Petition. Accordingly, defendant's motion for summary judgment (Doc. # 53) is hereby GRANTED on all counts of plaintiff's petition. Plaintiff's Motion to Amend Exhibit List (Doc. # 77); Plaintiff's Motion to Amend Witness List (Doc. # 78); Plaintiff's Motions in Limine; Defendant's Motions in Limine and Plaintiff's Motion for Leave to File Supplementation to Plaintiff's Suggestions in Opposition to Defendant's Motion in Limine to Exclude Certain Canisters of Beef Jerky (Doc. # 147) are hereby DENIED as MOOT.

Date: December 15, 2000
Kansas City, Missouri

/s/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CARL YOUNGBLOOD,	)	
Plaintiff,	)	
v.	)	Case No. 99-0629-CV-W-2-ECF
	)	
HY-VEE FOOD STORES, INC.,	)	
Defendant.	)	

ORDER

Currently pending before the Court is Defendant's Motion for Summary Judgment (Doc # 53). After consideration of the parties' arguments, the Court **GRANTS** defendant's motion for summary judgment. An order detailing the Court's reasoning will be issued shortly.

Date: November 1, 2000 /s/ FERNANDO J. GAITAN, JR.
Kansas City, Missouri Fernando J. Gaitan, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS,
FOR THE EIGHTH CIRCUIT

No. 00-3980.

Carl Youngblood,	x	
Appellant,	x	
v.	x	Order Denying Petition
	x	for Rehearing and for Hy-
Vee Food Stores, Inc.,	x	Rehearing En Banc
Appellee.	x	

The petition for rehearing en banc is denied. Judge Morris Sheppard Arnold and Judge William Jay Riley would grant the petition.

The petition for rehearing by the panel is also denied. (5128-010199)

November 12, 2001

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
MAR 18 2002
CLERK

No. 01-1193

In The

Supreme Court of the United States

CARL YOUNGBLOOD,

Petitioner,

vs.

HY-VEE FOOD STORES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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3118

QUESTION PRESENTED

Whether the circuit court properly affirmed summary judgment on behalf of Respondent on Petitioner's claim under 42 U.S.C. § 1981, where Petitioner was neither denied admission to nor service in Respondent's store, was permitted to and completed all desired purchases without any change in the terms or conditions for doing so, and was stopped for suspected shoplifting based upon probable cause only after completing his purchase?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This case involves the stop of Petitioner Carl Youngblood ("Youngblood") for suspected shoplifting by employees of Respondent Hy-Vee Food Stores, Inc. ("Hy-Vee"). Based on probable cause established by eyewitness observation, Youngblood was stopped for suspected shoplifting at the front of the Hy-Vee store only after Youngblood completed his purchase. At no time was Youngblood denied entrance to, nor service in, the Hy-Vee store. Before Youngblood was stopped, he was permitted to, and completed, his desired purchase. None of the terms for making or completing that purchase were changed or modified in any way and no special or discriminatory condition of any kind was placed on his ability to purchase.

The district court granted summary judgment to Hy-Vee because Youngblood suffered no actual loss of any contract interest, a necessary element of his 42 U.S.C. § 1981 claim. The circuit court affirmed, setting forth the well-established legal standard governing such claim: "Section 1981 does not provide a general cause of action for race discrimination if in fact it occurred. The requirement remains that a plaintiff must point to some contractual relationship in order to bring a claim under section 1981." (Pet. A-5).

Nothing about this case warrants certiorari. Indeed, the legal standard set forth by the circuit court in this case (which standard the court applied to undisputed facts) is consistent with all other circuit courts addressing

this issue in the retail setting. Contrary to Youngblood's assertions, there is no conflict among the circuits concerning the scope of his contract right under 42 U.S.C. § 1981. Indeed, all courts uniformly hold that a violation of 42 U.S.C. § 1981 requires "interference with a contract beyond the mere expectation of being treated without discrimination while shopping." *Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091, 1118 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 1071 (2002). In the petition, Youngblood complains of nothing more than alleged "erroneous factual findings or the misapplication of a properly stated rule of law," which are insufficient grounds for certiorari under this Court's rules. S.Ct. R.10. Accordingly, the petition should be denied.

COUNTERSTATEMENT

1. Factual Background. On April 13, 1998, Youngblood entered the Hy-Vee retail food store in order to buy beef jerky. While in the beef jerky section, Youngblood handled numerous canisters of beef jerky simultaneously, weighing them and examining their prices. He did so for five minutes before selecting a canister of beef jerky and walking away. One of Hy-Vee's employees, McVey, observed this and believed Youngblood placed his hands underneath his shirt. McVey believed this behavior to be unusual and indicative of attempting shoplifting so he continued to watch Youngblood. (Pet. A-15 – A-16).

After walking only a few steps away, Youngblood turned and walked back to the beef jerky section where he put the original canister back on the shelf and picked

up another one. Once again, McVey believed that Youngblood put his hands underneath his shirt with the new canister. Thereafter, Youngblood took the new canister and proceeded to the cash registers. (*Id.*).

While watching Youngblood walk toward the registers, McVey went to the beef jerky section and picked up the canister he had seen Youngblood put back on the shelf. When McVey opened the canister, he discovered that there was no foil seal on it and that it had only two or three pieces of beef jerky inside of it, instead of the usual amount. McVey took this canister and followed Youngblood to the front of the store where he paged a manager, Wagner, from a phone near the other registers. At this point, McVey explained to Wagner that he suspected Youngblood had beef jerky underneath his shirt. (*Id.*).

Youngblood completed his purchase and began to exit the store. As he did so, McVey and Wagner stopped him. When asked, Youngblood handed over his receipt and the bag he was carrying. (*Id.*). McVey then took the canister in Youngblood's possession out of the bag and opened it. (Pet. A-17). When he did so, McVey and Wagner saw that it was without its seal and "crammed full" of beef jerky. McVey believed the canister contained more beef jerky than it should have. Youngblood was then asked to go to an upstairs office with the Hy-Vee employees and he complied. The stop in the front of the store lasted only two to five minutes. (*Id.*).

Youngblood waited in the upstairs office for approximately twenty minutes before the police arrived. During

this time, the door to the office remained open and Youngblood was not physically restrained in any way. After the police officer arrived, he asked McVey what Youngblood had done and was told that Youngblood had taken the contents of one canister of beef jerky and placed them into another canister. (*Id.*). After examining the contents of the canister, the officer arrested Youngblood. (Pet. A-3). The criminal charges against Youngblood ultimately were dismissed. (*Id.*).

2. The Proceedings Below. By Order dated December 15, 2000, the district court granted summary judgment to Hy-Vee on all of Youngblood's claims specifically including his "contract clause" claim under 42 U.S.C. § 1981. In holding that Youngblood failed as a matter of law to establish interference with his right to make and enforce a contract, the district court distinguished *Hampton, supra*. "[C]ontrary to [Youngblood's] argument, the only reason the Court in *Hampton* declined to grant summary judgment was because plaintiffs had not completed the redemption of their cologne samples and were in the middle of finalizing this 'contract.' " (Pet. A-37). The district court held, as a matter of law, that probable cause existed for Youngblood's stop and prosecution. (Pet. A-49, A-51). As the district court determined:

> There is no dispute that while McVey was in the meat department, he observed plaintiff standing in front of the aisle containing the beef jerky. There is also no dispute that McVey believed that plaintiff was acting suspiciously and continued to observe him. McVey states that he observed plaintiff with his hands under his shirt and then saw plaintiff walk partway down the

> aisle toward the cash registers. McVey continued watching as plaintiff then turned around and returned to the beef jerky section and placed one canister of beef jerky back on the shelf and selected another. At this point, it was McVey's belief that plaintiff put the second canister underneath his shirt. As plaintiff was walking toward the cash registers, McVey went to the beef jerky section and picked up the canister of jerky that plaintiff had returned to the shelf. He opened it and discovered that it had no foil seal and only two or three pieces of jerky in the canister. After stopping plaintiff, McVey examined plaintiff's canister of beef jerky and saw that it was without its foil seal and appeared to be "crammed full" of beef jerky.

(Pet. A-48).

By Order dated September 17, 2001, Judges Robert Dawson and Theodore McMillian of the circuit's three judge panel, affirmed the district court's award of summary judgment to Hy-Vee on all of Youngblood's claims. Judge Richard Arnold dissented only with respect to the decision on the § 1981 "contract clause" claim.

In its holding, the circuit court set forth the legal issue on appeal as follows: "The question we must determine is whether any contractual relationship remained once Youngblood completed his purchase and if the taking of the beef jerky denied Youngblood a benefit of the contractual relationship." (Pet. A-4). The key to the determination of the issue "is whether any contractual duty remained after Youngblood made his purchase." *Id.* As the Eighth Circuit held:

> Once Youngblood paid the cashier and received the beef jerky from the cashier, neither party owed the other any duty under the retail-sale contract. This case is distinguishable from *Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001), where the Tenth Circuit found a contractual relationship existed after the purchase. In *Hampton*, the customer received a coupon for a fragrance sample as a benefit of her purchase and the Tenth Circuit concluded that the store had a contractual duty to allow the customer to redeem the coupon. *See id.* at 1103-05. In this case, nothing that happened after the sale created any further contractual duty on Hy-Vee's part. Accordingly, Hy-Vee cannot be said to have deprived Youngblood of the benefit of any contractual relationship, as no such relationship existed when it took the beef jerky away from Youngblood.

(Pet. A-4 – A-5).

In response to the dissent's position that the "entire contracting process" began the moment Youngblood entered the store, (Pet. A-13), the circuit court set forth the governing and unanimous law: "Section 1981 does not provide a general cause of action for race discrimination if in fact it occurred. The requirement remains that a plaintiff must point to some contractual relationship in order to bring a claim under section 1981." (Pet. A-5). By Order dated November 12, 2001, the circuit court denied Youngblood's petitions for rehearing and rehearing en banc.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS CONSISTENT WITH ALL FEDERAL COURT DECISIONS WHICH HOLD THAT § 1981 DOES NOT REGULATE DISCRIMINATION IN ALL ASPECTS OF SHOPPING OR A RETAILERS' LOSS PREVENTION PRACTICES.

The circuit's decision is consistent with the plain language of 42 U.S.C. § 1981, including the 1991 amendments thereto, its legislative history and all courts addressing its application in the retail context. As Part V of his petition makes abundantly clear, Youngblood takes issue solely with Hy-Vee's loss prevention practices and whether Hy-Vee had probable cause to stop him with the merchandise he had just purchased for suspected shoplifting. (Pet. pp. 15-17).[1] In challenging such loss prevention practices, Youngblood seeks to federalize all aspects of the retail shopping experience under the notion that § 1981 protects customers from harassment simply by entering a retail store. This notion has been rejected by every court to address it and, most recently, this Court denied to review this uniformly accepted legal principle. *See Hampton, et al. v. Dillard Department Stores, Inc.*, 247

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[1] Despite Youngblood's arguments (Pet. pp. 15-17), no question for review is presented concerning the Eighth Circuit's proper interpretation of this Court's decisions under Fed.R.Civ.P. 56 as established in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Indeed, Youngblood does not even allege that any conflict in the circuits exists on this point which would explain why he does not seek certiorari of any question concerning the proper application of Rule 56.

F.3d 1091, 1118 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 1071 (2002).

As the Tenth Circuit recognized in *Hampton*, all precedent throughout the country on the issue presented in the petition is consistent:

> [W]e refrain from adopting Amicus Curiae's . . . expansive interpretation that § 1981 broadens the scope of relevant civil rights and protects customers from harassment upon entering a retail establishment. Although Amicus Curiae proposes an arguable application, § 1981 is limited to remedy "any act of discrimination committed in the making or the performance of a contract." 137 Cong. Rec. S15483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth). . . . [W]e cannot extend § 1981 beyond the contours of a contract. We are aligned with all the courts that have addressed the issue that there must have been interference with a contract beyond the mere expectation of being treated without discrimination while shopping.

Hampton, 247 F.3d at 1118.

According to Youngblood and the dissent below, however, one need only focus on "where" the events at issue took place in determining whether or not § 1981(b) has been violated. If "on the store premises," (Pet. A-8), the conduct automatically would be subject to a damage action under § 1981. This reasoning focuses not on the contract or its benefits but more broadly on what the dissent improperly characterized as "the entire contracting process – from the time Youngblood entered the store until the time he was prevented from leaving with the beef jerky he had paid for . . . " (Pet. A-13). According to

this reasoning, once an individual enters a retail store, all aspects of the shopping experience immediately would be regulated by § 1981, including surveillance, interruption or detention of any kind at any time, no matter how slight, whether or not such conduct results merely in delay, inconvenience or ultimately prevents the completion of a purchase.[2]

Section 1981 does not regulate a retail store's loss prevention practices. Every court addressing this issue has rejected this expansive interpretation of § 1981. The federal courts unanimously recognize that racially motivated stops, investigations, or surveillance, short of outright denials of a sale or services, are not within § 1981 even though they may be interferences with ongoing shopping activities. In summary of the decisions of the courts on this issue, one federal court observed: "Racial profiling or stereotyping is highly objectionable. But when a private retailer engages in the practice, it does not create a basis for a federal claim by a customer unless the retailer deprives the customer of a right or interest protected by federal statute." *Garrett v. Tandy Corp.*, 142 F.Supp.2d 117, 118 (D. Me. 2001). The courts all hold that plaintiffs who face discriminatory surveillance, harassment or stops for shoplifting before or after completing a

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[2] The dissent describes the "entire contracting process," as follows: "Youngblood was singled out for surveillance by the store clerk before he made his purchase, singled out for suspicion as he walked to the register to make his purchase (when the store clerk alerted the manager), and singled out for detention by three employees as he tried to leave the store with his purchase." (Pet. A-13).

purchase, lack § 1981 claims.[3] Likewise, the courts hold that plaintiffs who are harassed or monitored while browsing or who, due to alleged discriminatory harassment or surveillance, voluntarily forego a purchase, lack § 1981 claims.[4]

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[3] *See Morris v. Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir. 1996) (surveillance and stop while browsing after purchase); *Rogers v. Elliott*, 135 F.Supp.2d 1312, 1315 (N.D. Ga. 2001) (accusations of stealing, profanity, and assault after purchase); *Garrett*, 142 F.Supp.2d at 119 (store called police who investigated and searched plaintiff's home and car after purchase); *Nevin v. Citibank, N.A.*, 107 F.Supp.2d 333, 349 (S.D. N.Y. 2000) (store called police who investigated plaintiff at home after purchase); *Jeffery v. Home Depot U.S.A., Inc.*, 90 F.Supp.2d 1066, 1069 (S.D. Cal. 2000) (purchase complete despite harassment and delay due to search request); *Holmes v. Dillard Dept. Store*, No. Civ.A.99-3444, 2000 WL 1725082, *3 (E.D. La. November 17, 2000) (stopped, asked to leave the store, and arrested after purchase); *Hickerson v. Macy's Dept. Store*, No. CIV.A.98-3170, 1999 WL 144461, *2 (E.D. La. March 16, 1999) (stop and harassment at exit and parking lot after purchase); *Singh v. Wal-Mart Stores, Inc.*, No. Civ.A.98-1613, 1999 WL 374184, *6 (E.D. Pa. June 10, 1999), *aff'd*, 225 F.3d 650 (3rd Cir. 2000) (delay, harassed, and interrogated while returning); *Ackaa v. Tommy Hilfiger Company*, No. CIV.A.96-8262, 1998 WL 136522, *6 (E.D. Pa. March 24, 1998) (purchase complete despite alleged discriminatory surveillance, accosting, false accusation of stealing, and removal from store); *Lewis v. J.C. Penney Co., Inc.*, 948 F.Supp. 367, 372 (D. Del. 1996) (stop and search after purchases); *Flowers v. TJX Companies, Inc.*, Case No. 91-CV-1339, 1994 WL 382515, *6 (N.D. N.Y. July 15, 1994) (purchase complete despite alleged discrimination in shopping).

[4] *See Bagley v. Ameritech Corp.*, 220 F.3d 518, 521 (7th Cir. 2000) (plaintiff cut off opportunity to purchase by leaving due to clerk's refusal to wait on her and offensive gestures); *Shawl v. Dillard's, Inc.*, ___ F.3d ___, No. 99-1409, 2001 WL 967887,*3 (10th Cir. Aug. 27, 2001) (allegedly discouraged from purchasing due

All federal courts addressing the issue have held that the actual loss of a § 1981 contract right in the retail environment occurs only when (1) an individual is prevented from making or completing a purchase,[5] or (2) an essential term of making or completing a purchase is changed or a special condition for purchasing is imposed.[6] In a retail sale, where a customer is permitted

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to rude clerk while shopping); *McCrea v. Saks, Inc.*, No. CIV.A.00-CV-1936, 2000 WL 1912726 (E.D. Pa. Dec. 22, 2000) (allegedly harassed and discouraged from purchasing while shopping); *Turner v. Fashion Bug Dept. Store*, 205 F.3d 1342, 1999 WL 1206862, *2 (6th Cir. Dec. 9, 1999) (store called police who arrested plaintiff while browsing); *Wesley v. Don Stein Buick, Inc.*, 42 F.Supp.2d 1192, 1201 (D. Kan. 1999) (harassment, threatening conduct and demand plaintiff leave while browsing); *Sterling v. Kazmierczak*, 983 F.Supp. 1186, 1192 (N.D. Ill. 1997) (stopped and arrested while browsing).

[5] *See Hampton*, 247 F.3d at 1105-06 (plaintiff Hampton prevented from completing redemption of coupon for a cologne sample which coupon she received upon making a purchase); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 874 (6th Cir. 2001), *opinion supplemented on denial of rehearing*, 266 F.3d 407 (6th Cir. 2001) (plaintiff prevented from making desired purchases when she was removed from the store and forced to leave her cart of merchandise behind); *Henderson v. Jewel Food Stores, Inc.*, No. 96 C 3666, 1996 WL 617165, *4 (N.D. Ill. Oct. 23, 1996) (plaintiff prevented from completing purchases in midstream).

[6] *See Hill v. Shell Oil Co.*, 78 F.Supp.2d 764, 777 (N.D. Ill. 1999) (requirement that plaintiffs pre-pay for gas changed an essential term of the buyer/seller contract); *Bobbitt by Bobbitt v. Rage, Inc.*, 19 F.Supp.2d 512, 519 (W.D. N.C. 1998) (requirement that plaintiffs pre-pay changed essential term of the customer/restaurant contract); *Buchanan v. Consolidated Stores Corp.*, 125 F.Supp.2d 730, 735-6 (D. Md. 2001) (refusing to permit plaintiffs to pay by check was special condition placed on ability to contract).

to complete his purchase, the alleged discrimination must take place at the point of sale in order to directly implicate the right to contract and to enjoy all benefits, privileges, terms, and conditions of the contractual relationship. *See Hill*, 78 F.Supp.2d at 777 (discriminatory pre-pay requirement constituted "direct impairment of the terms and conditions of their contractual purchase of gasoline."). Simply, there must be some change in an essential term of, or some special condition imposed on, his customer contract in order for Youngblood to be denied enjoyment of his contractual relationship. *See Id.; Buchanan*, 125 F.Supp.2d at 735-6.

Here, Youngblood was never prevented from making or completing his purchase. Indeed, Youngblood flatly admits completing it. It is further undisputed that no term for completing that purchase was changed nor was any special condition imposed on him. The store was not offering to sell two canisters of beef jerky for the price of one. In the absence of discrimination at the point of sale, Youngblood suffered no actual loss of any contractual right as required to maintain his claim.

Not only would Youngblood's interpretation federalize and regulate a retailer's loss prevention practices and all aspects of the shopping experience, it would negate state merchant's defense statutes such as MO.REV.STAT. § 537.125(2), (4), which have been carefully-crafted to combat the dual problems of discrimination and theft in the retail environment. Such statutes protect merchants from liability for detaining and questioning suspected shoplifters when they have a good faith, reasonable

belief, even if mistaken, that shoplifting is underway.[7] The reasoning of Youngblood and the dissent would render such statutes meaningless whenever a shopper issues a racial challenge to conduct made with probable cause of stealing.

Unless Congress clearly directs, this Court has been reluctant to federalize matters traditionally covered by state law. *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462,

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[7] MO.REV.STAT. § 537.125 provides as follows:

> 2. Any merchant, his agent or employee, who has reasonable grounds or probable cause to believe that a person has committed or is committing a wrongful taking of merchandise or money from a mercantile establishment, may detain such person in a reasonable manner and for a reasonable length of time for the purpose of investigating whether there has been a wrongful taking of such merchandise or money. Any such reasonable detention shall not constitute an unlawful arrest or detention, nor shall it render the merchant, his agent or employee, criminally or civilly liable to the person so detained. . . .
>
> 4. Any merchant, his agent or employee, who has reasonable grounds or probable cause to believe that a person has committed a wrongful taking of property, as defined in this section, and who has detained such person and investigated such wrongful taking, may contact law enforcement officers and instigate criminal proceedings against such person. Any such contact of law enforcement authorities or instigation of a judicial proceeding shall not constitute malicious prosecution, nor shall it render the merchant, his agent or employee criminally or civilly liable to the person so detained or against whom proceedings are instigated.

479 (1977). Indeed, the lower courts recognize: "The need to cabin the reach of the civil rights laws so as not to create a 'general federal tort law,' . . . , has long been a theme of the Supreme Court's decisional law." *Spencer v. Casavilla*, 839 F.Supp. 1014, 1019 (S.D. N.Y. 1993) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971)), *aff'd in part, appeal dismissed in part*, 44 F.3d 74 (2nd Cir. 1994).

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT.

Youngblood seeks certiorari based on his ill-conceived assertion that some split exists in the circuits concerning the scope of § 1981's "contract" clause in the context of retail sales. Youngblood boldly (albeit, erroneously) asserts, "[t]he First, Sixth, Seventh, Tenth, and Eleventh Circuits, however, take positions contrary to the Eighth and Fifth Circuits." (Pet. p. 11).[8] No such conflict exists. Indeed, to the extent that they address the scope of § 1981's contractual right at all, the cases cited by Youngblood are entirely consistent with each other and the

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[8] *See Morris v. Dillard Department Stores, Inc.*, 277 F.3d 743, 751 (5th Cir. 2001), where the Fifth Circuit held that banning a customer from a retail store following an arrest is insufficient to constitute the loss of an actual contract interest. Because there was no evidence indicating any tangible attempt to purchase, or return, specified goods, or to enter any other contractual agreement at any time during the course of the ban, the Fifth Circuit held: "We agree with the district court, therefore, that Morris' allegations based on the ban alone are too speculative to establish loss of any contractual interest owed to her by Dillard's." *Id.*, 277 F.3d at 753.

decision below. Youngblood apparently refuses to recognize that the circuits have done nothing more than apply the identical legal principle: There must be "the actual loss of a contract interest, not merely the possible loss of future contract opportunities" to establish a violation under § 1981. *See e.g., Hampton*, 247 F.3d at 1105; *Morris v. Office Max*, 89 F.3d at 414-15.

The Tenth Circuit in *Hampton* applied the identical legal principle as did the Eighth here. Liability was premised on the actual loss of a contract right, i.e., interruption in completing redemption of a cologne sample. *Hampton* vividly exemplifies the governing legal principle uniformly applied by the federal courts. Hampton suffered the actual loss of a contractual interest when she was prevented from redeeming the coupon she received at purchase and, thereby, from receiving her cologne sample. *Id.*, 247 F.3d at 1105-06. To the contrary, in the companion case of Cooper, Hampton's niece, Cooper had no contractual relationship at the time Dillards prevented her from redeeming her coupon. Thus, she did not suffer (and could not have suffered) the actual loss of any contractual right. *Id.*, 247 F.3d at 1117-18.

Only by wholly ignoring the existence of *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996) is Youngblood able to assert that the Seventh Circuit has established any legal standard inconsistent with the decision below. (Pet. pp. 12-13). Indeed, *Morris v. Office Max* is a seminal case in the retail setting. It set forth the guiding legal principle to which all other courts, including the circuit below, adhere – a § 1981 violation requires "the actual loss of a contract interest, not merely the possible loss of future contract opportunities." *Id.*, 89 F.3d at 414-15.

Youngblood's assertion that another Seventh Circuit decision, *Daniels v. Pipefitters Association Local Union No. 597*, 945 F.2d 906 (7th Cir. 1991), *cert. denied*, 503 U.S. 951 (1992) somehow creates a conflict (Pet. pp. 12-13), is simply incredulous. First, *Daniels* does not involve a retail sale of any kind; rather, it deals solely with the employment context. Second, *Daniels* is based on conduct that was actionable even before the 1991 amendments to § 1981, i.e., direct interference with the right to enter into employment contracts through the discriminatory operation of a job referral service at the union hall. *Id.*, 945 F.2d at 914-15.

Despite Youngblood's assertions to the contrary (Pet. p. 12), the Sixth Circuit in *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001), applied the identical legal principle to the facts at issue there. The difference in the outcome was that the plaintiff in *Christian*, unlike Youngblood here, suffered an actual contract loss; *i.e.*, she was prevented from completing any purchases. As the Sixth Circuit held,

> [W]e have no trouble concluding that Christian made herself available to enter into a contractual relationship for services ordinarily provided by Wal-Mart: the record reflects that she had selected merchandise to purchase, had the means to complete the transaction, and would, in fact, have completed her purchase *had she not been asked to leave the store.*

Id., 252 F.3d at 874 (emphasis added).

Although Youngblood asserts that the decision in *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341 (1st Cir. 1995) somehow conflicts with the Eighth

Circuit here (Pet. pp. 11-12), the African-American plaintiff there proceeded only "on the theory that her race-based exclusion from the dining area violated her right to make and enforce contracts." *Id.*, 67 F.3d at 346. Moreover, the First Circuit affirmed summary judgment against plaintiff solely on the grounds that no discriminatory animus existed: "As Alexis points to no competent evidence that Domina and McDonald's intentionally discriminated against her on account of her race, the district court correctly ruled that this section 1981 claim was not trial-worthy." *Id.*, 67 F.3d at 347. Notably, the First Circuit did not reach any issue concerning the nature or scope of Alexis' alleged contract right, as it was unnecessary.

Finally, Youngblood's assertion that *Moore v. Liberty National Life Insurance Co.*, 267 F.3d 1209 (11th Cir. 2001) somehow conflicts with any other court on the issue presented here (Pet. p. 13), is utterly incredible. *Moore* dealt solely with jurisdictional and procedural issues associated with state law. Indeed, the case's only substantive connection to § 1981 was that it contained allegations by a class of African-Americans who purchased life insurance policies from Liberty National that the insurance company had a policy of charging higher premiums and paying lower benefits to African-Americans than to whites. The sole issues determined by the Eleventh Circuit were as follows: whether Alabama's common law doctrine of repose applied to and barred plaintiff's federal civil rights claims and whether another federal statute mandated reverse preemption of plaintiff's §§ 1981 and 1982 claims. *Id.*, 267 F.3d at 1212. The Eleventh Circuit simply held that plaintiffs' claims were neither

barred nor reverse preempted. Nothing about this holding conflicts in any manner whatsoever with any court concerning the issue presented for review.

III. THE DECISION BELOW CORRECTLY INTERPRETS 42 U.S.C. § 1981(b) TO INCLUDE ONLY CONTRACTUAL RIGHTS AS REQUIRED BY THE STATUTE'S PLAIN LANGUAGE AND CLEAR LEGISLATIVE HISTORY.

The Eighth Circuit's opinion is an entirely accurate interpretation and application of the law governing Youngblood's § 1981 "contract clause" claim.[9] As the court correctly held, under § 1981, "once the purchase is completed, no contractual relationship remains." (Pet. A-4).[10] This determination is not only fully consistent

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[9] Youngblood does not seek certiorari of the denial of his § 1981 "full and equal benefits clause" claim.

[10] In relying on *Daniels*, Youngblood attempts to make the absurd comparison between the retail contract issue here and the ongoing contractual issues that exist in the employment context. However, the benefits in the employment context arise daily and can arise over a period of years which makes such relationship wholly distinct from the buyer/seller relationship in retailing. The employer/employee relationship requires mutual performance over time *i.e.*, the employer providing work and paying wages and benefits over time in exchange for continuing performance of duties by the employee. The performance and duration of the employment contract is continuous and ongoing until the employee quits or is discharged. In contrast, the buyer/seller relationship in a retail sale involves only payment and acceptance of payment. In retail, "when a person is shopping at a department store, the act of purchasing an item creates a contractual relationship between the buyer and seller." *Holmes*, 2000 WL 1725082, at *2.

with the decisions of all courts which have addressed § 1981 claims based on alleged discrimination in a retail store's loss prevention policies and practices, but also the proper interpretation of the plain language of § 1981 and the 1991 amendments thereto.

The terms of the statute, legislative history, and case law limit § 1981, as distinct from other civil rights and public accommodation statutes, to actual losses of contract rights, not interruptions, surveillance, delays or stops for shoplifting, even if racially motivated. Just as this Court held in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), that § 1982 "is not a comprehensive open housing law," it is clear that even after the 1991 amendments, § 1981 is not a broad-based prohibition of all forms of race discrimination in retailing or public accommodation.

This Court has traced the evolution of 42 U.S.C. § 1981 and addressed its legislative history on more than one occasion. *See e.g., Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994); *Patterson v. McClean*, 491 U.S. 164 (1989); *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Runyon v. McCrary*, 427 U.S. 160 (1976).

As the legislative history clearly establishes, the 1991 amendments, which added § 1981(b), do not in any way

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After a purchase is complete, no contractual relationship remains. *Lewis*, 948 F.Supp. at 372.

eliminate or negate the statute's contract base. "The Committee intends this provision to bar all racial discrimination in *contracts.*" H.R. Rep. No. 102-40 (II) at 37, *reprinted in* 1991 U.S.C.C.A.N. 694, 731 (emphasis added). Congress specifically identified the problem with *Patterson* which it was rectifying: "Prior to the *Patterson* ruling, every federal court of appeals had held that section 1981 prohibits not just discrimination at the formation of an employment contract, but discrimination *during the performance of that contract as well.*" H.R. Rep. No. 102-40 (I) at 90, *reprinted in* 1991 U.S.C.C.A.N. 549, 628 (emphasis added). Finding first that *Patterson* conflicted with this federal appellate case law, "The Committee also finds no basis in the Civil Rights Act of 1966 or its legislative history for distinguishing between race discrimination which occurs at the formation of the employment contract and *that which occurs later in the performance of the contract.*" *Id.*, at 92, U.S.C.C.A.N. at 630 (emphasis added).[11]

Recently, the circuit court below succinctly analyzed the legislative history of the 1991 amendments to § 1981 as follows:

> In 1989, the Supreme Court interpreted the "make and enforce" language of § 1981 narrowly, construing the section to prohibit only discriminatory conduct at the "making" of the contract and not covering discrimination after the contract's inception. *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 109 S.Ct. 2363,

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[11] Notably, § 1981(b) was passed to address specifically the scope of the statute's prohibition in the employment context which had been limited by the Court's decision in *Patterson.*

> 105 L.Ed.2d 132 (1989). In response to *Patterson*, Congress amended § 1981 through the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. The Act broadened, *inter alia*, the phrase "make and enforce contracts": "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and *termination* of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (1994) (emphasis added). *Section 1981, as amended, now clearly prohibits racially discriminatory conduct that occurs from the inception through the end of a contract.*

Skinner v. Maritz, 253 F.3d 337, 339 (8th Cir. 2001) (emphasis added).

Congress passed § 1981(b) to confirm that the statutory prohibition on discrimination applies not only to the formation of contracts but the performance of contracts as well. The circuit's decision below embraces and abides by this analysis and interpretation, as do all other courts.[12] In contrast, the reasoning set forth by Youngblood in his petition and the dissent below sweeps broadly past it to encompass, not only, conduct unrelated to contract

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[12] Both the district and circuit courts below focused on the appropriate legal question – when does the contractual relationship at issue in this particular case end? Both then provided the correct legal answer – the buyer/seller contractual relationship in the retail setting ends – and so does § 1981 – once the purchase is complete.

performance but conduct occurring after that contractual relationship has ended as well.[13]

In defending his unlimited expansion of § 1981 (Pet. p. 14), Youngblood "retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes." *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding and Dry Dock Co.*, 514 U.S. 122, 135 (1995). Although Hy-Vee is entirely mindful of the remedial nature of this statute and is in agreement with its noble purposes, they do not provide a *carte blanche* to extend the statute to include protections not contained within it.

As the circuit below has insightfully cautioned,

> When interpreting remedial statutes, however, it is invariably necessary to temper generalized recitations of legislative purpose with the precise language used to define a law's parameters.

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[13] Youngblood's references to Missouri law are wholly erroneous. (Pet. p. 9). Nothing cited by Youngblood extends the duration of his contractual relationship. In Missouri, a cash transaction is complete when the purchase price is paid. Title passes with the acceptance of the price and the sale is completed even though attempted delivery may not ever be fully accomplished. Withholding of possession does not affect the right to or passage of title. *See Calcara v. U.S.*, 53 F.2d 767, 768 (8th Cir. 1931); *see also In re Venie*, 80 F.Supp. 250, 253 (W.D. Mo. 1948); *Matter of Frieze*, 32 B.R. 194, 196 (Bankr. W.D. Mo. 1983). Further, "[o]nce the buyer has inspected the goods and has accepted them, he cannot later reject the merchandise and rescind the contract for claimed defects." *Stephens Indus., Inc. v. American Express Co.*, 471 S.W.2d 501, 504 (Mo. Ct. App. 1971). Here, it cannot be (and has never been) disputed that Youngblood accepted his item, was leaving the store and never attempted to reject it.

> This appeal is illustrative. To be sure, Congress passed the [Americans with Disabilities Act] in a noble effort to eradicate the widespread and senseless discrimination which had for so long persisted against those perceived to be "disabled." Nevertheless, a court of law must venture beyond such sweeping abstractions and ask various questions which, without a doubt, will fail to produce the sort of emotional thunder often engendered by broadly worded statements of remedial intent, but which are indispensable to a meaningful application of a statute.

Dush v. Appleton Elec. Co., 124 F.3d 957, 961 (8th Cir. 1997).

Here, Youngblood was not denied entrance to, nor was he asked to leave, Hy-Vee before fully completing his purchase. Youngblood was denied no services by Hy-Vee. He admits that he completed his purchase and was exiting the store when he was stopped for shoplifting. Simply, no contractual relationship existed at that time. Thus, his allegations concerning conduct after that time did not affect (and cannot have affected) any aspect of a contractual relationship created by the purchase. Further, he neither alleged nor established that any term of his customer contract was changed in any way, or that any special or discriminatory condition was imposed on him. Accordingly, as the circuit below properly affirmed, Youngblood's § 1981 contract claim fails as a matter of law. This determination is consistent with the plain language of the statute including the 1991 amendments, its legislative history and the decisions of all courts addressing the issue.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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No. 01-1193

In The

Supreme Court of the United States

CARL YOUNGBLOOD,

Petitioner,

v.

HY-VEE FOOD STORES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

In his petition for certiorari ("PET."), plaintiff, Carl Youngblood, identifies a profound conflict among the circuit courts of appeals. PET. 10-14. That conflict prompted the Eighth Circuit opinion below,[1] which erroneously upholds summary judgment on Youngblood's § 1981 claims. Specifically, the circuit courts of appeals are divided as to whether the "make and enforce contracts" provision of 42 U.S.C. § 1981 pertains to racial discrimination occurring in a contractual relationship after formation of a retail contract (as the plain language suggests), or only to discrimination occurring before the contract is formed. PET. 10-14. Youngblood suggests that because this division between the circuits involves interpretation of our civil rights laws – a recurring question of undisputed importance – this case warrants review by this Court. PET. 14.

Respondent's Brief in Opposition ("OPP.") claims that "Youngblood complains of nothing more than alleged 'erroneous factual findings or the misapplication of a properly stated rule of law.'"[2] OPP. 2. Yet, Respondent, Hy-Vee, dedicates nearly its entire brief to responding that it finds no split among the circuit courts. OPP. 2-23.

The district court below correctly holds that "plaintiff has established ... that Hy-Vee had the requisite intent to discriminate against him" because of his race. PET. A-34. Throughout its Opposition, however, Hy-Vee clings to its

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[1]Judge Richard Arnold filed a dissent. PET. A-7. Judge Morris Sheppard Arnold and Judge William Jay Riley would grant the petition for rehearing. PET. A-59.

[2]Interestingly, Hy-Vee devotes three pages of its brief to its false and contested version of the facts, wrongly adopted below. OPP. 3-5.

pretextual excuse for its racial discrimination, repeatedly referring to "loss prevention practices." In doing so, Hy-Vee seeks to downplay the fact that the district court found sufficient evidence of Hy-Vee's intent to discriminate because of Youngblood's race. PET. A-34.

Hy-Vee divides its argument into three sections, each repeating the same theory – that allegedly there is no conflict among the circuits. Hy-Vee's lead counsel,[3] however, makes the opposite argument regarding the same issue, in a case recently before this Court: *Hampton v. Dillard Dept. Stores, Inc.*, 247 F.3d 1091 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 1071 (February 2002) (Supreme Court Case No. 01-842).[4] In Petitioner's Reply In Support of a Petition for Writ of Certiorari ("DILLARD REP.") counsel argues that:

> "[T]his case implicates a mature circuit conflict because Hampton could not have prevailed if her case were decided under the standards applied by the Seventh, Fifth and *Eighth* Circuits." DILLARD REP. 5 (emphasis added).

In response to the conflict Youngblood points to from the Sixth Circuit (PET. 12), Hy-Vee claims that "all federal courts addressing the issue have held that the actual loss of a § 1981 contract right in the retail environment occurs only when an individual is prevented from making or completing a purchase." OPP. 11. However, in Dillard's Reply Brief in *Hampton*, Hy-Vee's counsel acknowledges the conflicting

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[3]Jack L. Whitacre

[4]At the time of filing, Youngblood's petition made reference to *Hampton*, as "presently" before the Supreme Court. Since the filing date, this Court has denied certiorari for the correct holding from the Tenth Circuit.

standard in the Sixth Circuit, stating:

> [A] plaintiff may recover not only if she were "deprived of services while similarly situated persons outside the protected class were not," *but also* when she actually "received services" but "in a markedly hostile manner and in a manner that a reasonable person would find objectively discriminatory." *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir. 2001). DILLARD REP. 8 (emphasis added).

Hy-Vee also makes the disingenuous claim that "the circuits have done nothing more than apply the identical legal principle: There must be the actual loss of a contract interest...to establish a violation under § 1981." Yet, in Dillard's brief, Hy-Vee's lead counsel points to the *Christian*[5] opinion from the Sixth Circuit, and states, "the importance of *Christian* is that it does not require – as the Seventh, Fifth, and Eighth Circuits do – the actual loss of a contract right." DILLARD REP. 8.

The further suggestion by Hy-Vee that all federal courts have consistently held that the loss of a § 1981 contract right in the retail environment can occur only before a contract is formed, is again, simply not true. Many federal courts have found a basis for § 1981 claims from conduct occurring after formation of a retail contract.[6] In fact, the Eighth Circuit, in its

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[5]252 F.3d at 872.

[6]*Callwood v. Dave & Buster's, Inc.*, 98 F.Supp.2d 694, 703 (D.Md. 2000) ("as amended, Section 1981 provides protection against discriminatory conduct occurring during and after the formation of a contract."); *Perry v. Burger King Corp.*, 924 F.Supp. 548, 552 (S.D.N.Y.1996) (denying motion to dismiss where customer finished and

opinion below, acknowledges that the "Tenth Circuit found a contractual relationship existed after the purchase." *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 854 (8th Cir.2001) (citing *Hampton*).

In *Hampton* the Tenth Circuit held that a coupon received by the plaintiff as a result of her purchase "was a benefit of Ms. Hampton's contractual relationship with Dillard's." *Hampton*, at 1105. The court also held that the store violated § 1981 when it took the coupon from Hampton and did not return it. *Id.*, at 1104-1106. This Court denied Dillard's petition for a writ of certiorari on those issues. 122 S.Ct. 1071. Accordingly, it can not be credibly argued that the item received by Youngblood as a result of his purchase was not a "benefit" of his contractual relationship with Hy-Vee. Likewise, Hy-Vee's taking of the item without returning it (or the purchase price), and forcibly removing Youngblood from the store, cannot be consistently permitted under § 1981, when Hy-Vee's motivation was the color of Youngblood's skin. PET. A-34.

Moreover, federal courts have held that the determination of what constitutes a benefit of a retail contract is not a question for the court, but a question of fact for the jury.

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paid for meal and sought to use restaurant's restroom; noting that plaintiff may be "considered to have contracted for food and use of the bathroom... as benefit of contractual relationship); *McCaleb v. Pizza Hut of America, Inc.*, 28 F.Supp.2d 1043, 1049 (N.D.Ill.1998) (denying summary judgment where defendant failed to provide plaintiffs the full benefits of the contract in that they failed to provide them with the proper utensils with which to eat their pizza and created a disturbing atmosphere in which to eat and interfered with the full enjoyment of the contract by driving plaintiffs out before they had completed eating all that they had intended to eat); *Hall v. Pennsylvania State Police*, 570 F.2d 86, 92 (3d Cir. 1978) (§ 1981 obligates commercial enterprises to extend the same treatment to contractual customers "as is enjoyed by white citizens").

Hampton, 247 at 1099 (10th Cir. 2001); *See also, Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 878 (6th Cir. 2001). Determining the intended benefits of a non-written contract involves interpretation of subjective evidence and credibility determinations which are to be made by a jury. *See, Thompson v. Keohane*, 516 U.S. 99, 110-111, 116 S.Ct. 457, 464 (1995). The Eighth Circuit improperly made fact determinations, and incorrectly held – without supporting authority – that the contractual relationship in this retail context ended (and began) at the point of purchase. *Youngblood*, at 854. PET. A-5.

While some federal courts hold that a violation of § 1981 may occur without the actual loss of a contract interest, *see, Christian*, a definite contractual interest was formed in this case when Youngblood made his purchase. That interest was violated when Hy-Vee then took the item purchased – the essence of the contract – away from Youngblood and did not return it. Pet. A-35. Hy-Vee thereby revoked Youngblood's contract interest when it denied him the "enjoyment of all *benefits*, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

After Hy-Vee denied Youngblood the benefit of his contract, Youngblood attempted to enforce his contract by asking Hy-Vee to return to him either the item he purchased, or his money. PET. A-17, A-32. Hy-Vee refused Youngblood's attempt to enforce and responded, "You and your people have to pay back double the amount." PET. A-17, A-32. In doing so, Hy-Vee discriminated against Youngblood because of his race (PET. A-34), and refused him the right to "make and enforce contracts" on that basis. § 1981(b).

Hy-Vee seeks to alarm this Court by misrepresenting Youngblood's position. OPP. 6-7. Youngblood, however, does not seek to expand § 1981 to create "a general cause of action for race discrimination," nor to "federalize all aspects of the

retail shopping experience under the notion that § 1981 protects customers from harassment simply by entering a retail store." On the contrary, Youngblood has demonstrated that his specific contract rights were violated by Hy-Vee, and Youngblood merely seeks uniform enforcement of Section 1981 because Hy-Vee denied him the right to make and enforce his contract, as defined by § 1981(b).

Hy-Vee's misdirection continues when it focuses on the requirement that an individual must be "prevented from making or completing a purchase" in cases claiming § 1981 liability for retail customers who "feel" "harassed" or "discouraged" from purchasing, without ever showing an intent to contract.[7] OPP. 10, 11. In those cases, plaintiffs did not state a § 1981 cause of action because they could not show that they attempted to purchase anything, and, therefore, did not form a contractual relationship. This case presents a wholly different issue. Youngblood undisputedly proved his intent to contract for the item he purchased for consumption when he took the item to the register and paid for it. PET. A-16. When Youngblood handed the cashier his money and the cashier accepted it, a contractual relationship was formed. *See, Hickerson v. Macy's Dept. Store*, 1999 WL 144461, *2 (E.D. La. 1999) (when shopping in a store, act of purchasing an item creates a

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[7] *Bagley v. Ameritech Corp.*, 220 F.3d 518 (7th Cir. 2000); *Flowers v. TJX Companies, Inc.*, 1994 WL 382515 (N.D.N.Y. 1994); *Hickerson v. Macy's Dept. Store*, 1999 WL 144461 (E.D. La. 1999); *Jeffery v. Home Depot U.S.A., Inc.*, 90 F.Supp.2d 1066 (S.D. Cal. 2000); *McCrea v. Saks, Inc.*, 2000 WL 1912726 (E.D. Pa. 2000); *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir. 1996); *Nevin v. Citibank, N.A.*, 107 F.Supp.2d 333 (S.D. N.Y. 2000); *Shawl v. Dillard's, Inc.*, 2001 WL 967887 (10th Cir. 2001) (unpublished opinion); *Sterling v. Kazmierczak*, 983 F.Supp. 1186 (N.D. Ill. 1997) (implicating employment); *Turner v. Fashion Bug Dept. Store*, 205 F.3d 1342 (6th Cir.) (unpublished opinion implicating employment); *Wesley v. Don Stein Buick, Inc.*, 42 F.Supp.2d 1192 (D. Kan. 1999).

contractual relationship between buyer and seller), citing, *Morris v. Office Max, Inc.*, 89 F.3d 411 (7th Cir.1996)).

Hy-Vee cites more inapposite cases in which the plaintiffs did not have their purchases taken from them, and did not lose the benefit of a contract, as Youngblood did.[8] Hy-Vee's further prestidigitation focuses on the "special condition" standard for cases dealing with discrimination *before* contract formation.[9] OPP. 11, 12, 23. This case, however, raises an entirely different question: Is the freedom to leave a store with the benefit of a purchase a part of the contractual relationship as defined by § 1981(b)?

Under Hy-Vee's theory and the lower court's exceptionally narrow view, the "contractual relationship" would last only for the brief time between the moment a customer pays for an item, to the instant he or she receives that item back. Accordingly, a retailer's blatant discriminatory conduct would be allowed in the contracting process so long as it did not occur during those few seconds. A similar theory, espoused in *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-7, 109 S.Ct. 2363, 2372-3 (1989) (plaintiff's right to make and enforce contracts in employment consisted only of right to form contract with no § 1981 protection after formation), was expressly overruled by

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[8] *Ackaa v. Tommy Hilfiger Company*, 1998 WL 136522 (E.D. Pa. 1998); *Flowers v. TJX Companies, Inc.*, 1994 WL 382515 (N.D. N.Y. 1994); *Garrett v. Tandy Corp.*, 142 F.Supp.2d 117 (D.Me. 2001); *Holmes v. Dillard Dept. Store*, 2000 WL 1725082, (E.D. La. 2000); *Lewis v. J.C. Penney Co., Inc.*, 948 F.Supp. 367 (D. Del. 1996); *Nevin v. Citibank, N.A.*, 107 F.Supp.2d 333 (S.D. N.Y. 2000); *Singh v. Wal-Mart Stores, Inc.*, 1999 WL 374184 (E.D. Pa. 1999).

[9] *Bobbitt by Bobbitt v. Rage Inc.*, 19 F.Supp.2d 512 (W.D. N.C. 1998); *Buchanan v. Consolidated Stores Corp.*, 125 F.Supp.2d 730 (D. Md. 2001); *Hill v. Shell Oil Co.*, 78 F.Supp.2d 764 (N.D. Ill. 1999).

Congress when it amended § 1981 to define "make and enforce contracts" as including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b); H.R. Rep. No. 40-(II), 102 Cong. 1st Sess. 1991, 1991 WL 87020.

Hy-Vee argues there should be a different standard for employment contract cases and retail contract cases because employment contracts are generally longer in duration. OPP. 18 n. 10. Hy-Vee disregards the fact that Congress expressly intended the § 1981 amendments to apply to contexts in addition to the employment context.[10] Hy-Vee also conspicuously ignores (as does the court below) that retail contracts do not conclude at formation.[11] The contractual relationship in a retail setting extends through the implied warranty of merchantability. 400.2-314 RSMo; PET. 3-4. After a sale, consumers are able to return or exchange products and they have recourse against merchants who sell defective products. In any case, the contractual relationship continues at least until the buyer has had a reasonable opportunity to inspect the consumer goods. 400.2-606 RSMo; PET. 5. In this case, Youngblood did not have an opportunity to leave the store, let

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[10]H.R. REP. 102-40(I), *93, 1991 U.S.C.C.A.N. 549, **631 ("[a]lthough section 1981 is most commonly used to remedy employment discrimination, the damage caused by *Patterson* has been extended to other types of contractual relations. Section 210 also would restore that relief. Section 210 further restores the relief once available under federal law in contexts other than employment").

[11]In support of its implausible position that retail transactions do not create a contractual relationship beyond the point of sale, Hy-Vee cites a Prohibition Era criminal case in which the question was: when during a transaction could defendant's intent to purchase illegal whiskey be determined? *Calcara v. United States*, 53 F.2d 767 (8th Cir. 1931).

alone to inspect the contents of the sealed package Hy-Vee sold him. PET. A-3.

As noted by the dissent, "whether Youngblood had been detained and the [product] seized prior to his paying for it, as he was paying for it, or as he was heading for the exit with it should not make a difference under § 1981." And, as Hy-Vee's own counsel has noted, "[L]iability under Section 1981 should not be made to depend upon the purely fortuitous timing" [of a store's discriminatory intervention]. DILLARD REP. 7.

The plain language of the statute and its legislative history establish that Congress clearly intends § 1981 to pertain to racial discrimination that affects one's rights, after a contract is formed. § 1981. *See, Callwood,* at 703; *McCaleb* at 1048.

When the Eighth Circuit panel holds that contractual relationships are cut-off at the point of purchase for § 1981 purposes, the lower court disregards *Hampton* and this Court's opinion in *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 298, 114 S.Ct. 1510 (1994) (clarifying that the term "make and enforce contracts" in § 1981 embraces "all phases and incidents of the contractual relationship, including discriminatory contract terminations"); *Andrews v. Lakeshore Rehabilitation Hosp.*, 140 F.3d 1405, 1410 (11th Cir. 1998); *Aiken v. City of Memphis*, 37 F.3d 1155, 1176 (6th Cir. 1994); *see also, Youngblood,* at 857. When Hy-Vee took from Youngblood the item he purchased, before he left the store, Hy-Vee terminated the contract. Even if the contractual relationship were to cease at contract formation, as the circuit court below uniquely holds, an "incident" of that relationship had to include the intent that Youngblood would retain the item, once purchased; Hy-Vee does not allow people to leave its store with grocery items, unless they have entered into a retail sales contract. The dissent explains, "[a] person's right to leave a store where he has purchased an item without being surrounded, detained, and

having the item removed from his possession (and his money not returned) can easily be understood as a 'benefit' of the contract." *Youngblood,* at 859.

The lower court impermissibly narrows § 1981 by selectively reading the statute and opinions dealing with its scope. "The list set forth in subsection (b) of the statute, which gives examples of what might constitute the "making" or "enforcing" of a contract under the [Civil Rights] Act, 'is intended to be illustrative rather than exhaustive.'" *Hampton,* at 1104; H.R. REP. 102-40(I), *91-93, 1991 U.S.C.C.A.N. 549, **630-31 ("Committee intends provision to bar all race discrimination in contractual relations"). The narrow interpretation of § 1981 suggested by Hy-Vee (and adopted by the circuit court below) violates Congressional intent, especially given the statute's remedial purpose and its intended broad construction. *Id.* But, Hy-Vee argues that the statute should not be interpreted broadly, as Congress expressly intended. OPP. 22. In so arguing, Hy-Vee promotes a *Patterson* approach to stifling § 1981 – an approach already disapproved by Congress and this Court. *Id.; See generally, Rivers.* Regardlessly, the Eighth Circuit adopts a position contrary to the First, Sixth, Seventh, Tenth, and Eleventh Circuits, permits Hy-Vee's blatant discrimination in connection with a retail contract, and carves the entire post-formation phase of contractual relations from the protections offered by § 1981.

CONCLUSION

For the above-stated reasons, the petition for certiorari should be granted.

Respectfully submitted,

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